



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>







17  
18

# ELEMENTS OF DAMAGES.

A HANDBOOK

FOR THE

USE OF STUDENTS AND PRACTITIONERS.

BY

ARTHUR G. SEDGWICK.

---

BOSTON:

LITTLE, BROWN, AND COMPANY.

1896.

**LIBRARY OF THE  
LELAND STANFORD JR. UNIVERSITY.**

*A 42747*

*Copyright, 1896,*

**BY ARTHUR G. SEDGWICK.**

**University Press :**

**JOHN WILSON AND SON, CAMBRIDGE, U. S. A.**

TO  
F. V. BALCH.



## P R E F A C E.

---

THIS book is an attempt to review the law of Damages, to state its principles so far as possible in the form of rules, or propositions of law, such as a court might lay down to a jury,—many of them have, in fact, been authoritatively laid down to juries,—and to illustrate these by the cases from which they have been drawn. It is not to be supposed that all the rules given are in force everywhere. But taken altogether they are intended to exhibit the Common Law Scheme of Damages. Where serious local differences exist, the difference has been stated, and its cause, so far as possible, explained.

It should be added that the book is not an abridgment of “Sedgwick on Damages.” The whole field covered has been re-examined ; indeed, the purpose of the two books will be seen to be quite different. With reference to matters of antiquarian or historical research, the attempt has been made to follow safe guides,—such as Holmes in this country, and Pollock and Maitland in England,—and to avoid advancing original speculations.

Most of the leading cases will be found in Professor Beale's Cases on Damages, collected (for the same series) to accompany this volume.

A. G. SEDGWICK.

NEW YORK, *Nov.* 8, 1895.

# TABLE OF CONTENTS.

---

	PAGE
PREFACE . . . . .	iii
TABLE OF CASES. . . . .	vii

## PART I.

### MEASURE AND PROOF OF DAMAGES.

INTRODUCTION . . . . .	1
CHAPTER	
I. COMMON LAW PRINCIPLES . . . . .	15
II. CERTAINTY . . . . .	26
III. RULES OF EXCLUSION . . . . .	32
IV. TORT AND CONTRACT . . . . .	40
V. CAUSE AND CONSEQUENCE . . . . .	45
VI. AVOIDABLE CONSEQUENCES . . . . .	74
VII. NOMINAL AND EXEMPLARY DAMAGES . . . . .	81
VIII. ELEMENTS OF INJURY . . . . .	95
IX. LIMITATIONS OF INJURY . . . . .	108
X. VALUE AND PRICE . . . . .	120
XI. INTEREST . . . . .	127

## PART II.

### TORT AND CONTRACT.

XII. DAMAGES IN TORT . . . . .	139
XIII. PERSON AND FAMILY . . . . .	149
XIV. DEATH BY WRONGFUL ACT . . . . .	172

CHAPTER	PAGE
XV. TORTS AFFECTING RIGHTS OF PROPERTY AND CONTRACT . . . . .	178
XVI. DAMAGES IN CONTRACT . . . . .	208
XVII. BONDS, LIQUIDATED DAMAGES, AND ALTERNA- TIVE CONTRACTS . . . . .	216
XVIII. PARTICULAR CLASSES OF CONTRACTS . . . . .	237
XIX. CARRIERS . . . . .	275
XX. TELEGRAPHIC DESPATCHES . . . . .	294
XXI. BREACH OF PROMISE . . . . .	302
XXII. CONTRACTS AFFECTING REAL ESTATE . . . . .	309
<hr/>	
APPENDIX . . . . .	323
INDEX . . . . .	327

# TABLE OF CASES.

[REFERENCES ARE TO PAGES.]

	Page		Page
Abrahams v. Kidney	61, 170	Bain v. Fothergill	320
Adams v. Smith	105	Baker v. Drake	23, 142, 182
Adams Exp. Co. v. Egbert	126	— v. Martin	261
Aetna Ins. Co. v. Johnson	263	Baldwin v. United States	
Ainslie v. Wilson	259	Tel. Co.	800
Alexander v. Blodgett	151	Ballentine v. Robinson	247
— v. Jenkins	159, 160	Ballou v. Farnum	95, 105
Allegheny v. Zimmerman	57	Baltimore & O. R. R. Co.	
Allen v. Fox	188	v. Carr	142
— v. Jarvis	249	— v. Wightman	175
— v. Truesdell	58	Baltimore & P. R. R. Co.	
Allison v. Chandler	28	v. Fifth Bapt. Church	98, 198
Allsop v. Allsop	105	Barnard v. Poor	86
American Cent. Ins. Co. v. Mc-		Barnes v. Jones	88
Lanathan	235	Barnum v. Vandusen	62
American L. & H. Ins. Co.		Barr v. Moore	88
v. Robertshaw	270	Barrick v. Schifferdecker	194
Andrews v. Durant	137	Barry v. Cavanagh	249
Angus v. Clifford	253	Bartlett v. Kidder	115
Anonymous (60 N. Y. 262)	47	— v. Western Un. Tel. Co.	298
Armfield v. Marsh	75	Bartley v. Richtmyer	170
Armory v. Delamirie	115	Batchelder v. Sturgis	816
Arnold v. Suffolk Bank	246	Battishill v. Reed	112
Ashley v. Harrison	57	Baxendale v. London C. &	
Attersoll v. Stevens	113	D. Ry. Co.	285
Aurora City v. West	138	Beach v. Hancock	105, 151
Austin v. Wilson	88	Beck v. Thompson	89
Averett v. Kendrick	205	Beede v. Lamprey	181
Ayres v. Chicago & N. W.		Bell v. Cunningham	274
Ry. Co.	287	Benjamin v. Storr	195, 196
		Bennett v. Beam	307
Bach v. Levy	250	— v. Lockwood	79
Bacon v. Cropsey	191	— v. Smith	156
Badger v. Titcomb	111	Benson v. Malden & M. G.	
Bagley v. Peddie	228	L. Co.	79
— v. Smith	28	Bergmann v. Jones	85
Baily v. Merrell	198	Bernstein v. Meech	29, 210
		Berry v. Da Costa	306, 807

	Page		Page
Bibb v. Freeman	314	Bundy v. Maginess	88
Bickford v. Rich	138	Burk v. Serrill	320
Bigaouette v. Paulet	171	Burlingame v. Goodspeed	265
Bingham v. Weiderwax	318	Burnett v. Simpkins	307
Black v. Carrollton R. R. Co.	168	Burrage v. Crump	223
Blackman v. Gardner & P. Bridge	154	Burton v. Pinkerton	34
Blackstone v. Alemannia F. Ins. Co.	266	Bush v. Prosser	156
Blagge v. Ilsley	61, 170	Byne v. Moore	163
Blake v. Lord	51, 146		
— v. Midland Ry. Co.	175	Cadman v. Markle	213
Blanchard v. Ely	29	Cahen v. Platt	248
Blot v. Boiceau	271	Calton v. Bragg	128
Blumhardt v. Rohr	158	Campbell v. Somerville	259
Blydenburgh v. Welsh	120	Carpenter v. Dresser	117
Bodkin v. Western Un. Tel. Co.	300	— v. Providence Wash. Ins. Co.	265
Bodley v. Reynolds	62	Carr v. Edwards	128
Bogert v. Burkhalter	146	Carter v. Towne	59
Bolling v. Lersner	204	Cary v. Gruman	123, 126
Boom Co. v. Patterson	124	Cecconi v. Rodden	812
Booth v. Ratté	197	Cecil v. Hicks	134
— v. Spuytin Duyvil R. M. Co.	71	Chapman v. Kirby	28
Borradaile v. Brunton	251	— v. Thames Mfg. Co.	88
Borries v. Hutchinson	69	Chase v. Allen	228
Boston Mfg. Co. v. Fiske	293	Chaude v. Shepard	223
Boyle v. Brandon	61	Cherry v. McCall	88
— v. Edwards	313	Chicago v. Huenerbein	28
Bradley v. Fuller	199	Chicago & A. R. R. Co. v. Flagg	106
Bradshaw v. Crosby	317	— v. Pennell	54, 58
Brannon v. Hursell	134	Chicago, B. & Q. R. R. Co. v. Hale	285
Brant v. Gallup	78	Chicago & N. W. Ry. Co. v. Stanbro	289
Brinsmead v. Harrison	178	Chicago, R. I. & P. R. R. Co. v. Carey	77
British Col. S. M. Co. v. Nettleship	35, 57, 71	Citizen's St. Ry. Co. v. Ter- maine	168
Britton v. Turner	215	City of Allegheny v. Zim- merman	57
Brook v. Rawle	161	City of Chicago v. Huenerbein	28
Brown v. Bowen	113	Claridge v. South Stafford- shire Tramway Co.	115
— v. Chicago, M. & St. P. Ry. Co.	292	Clark v. Chambers	54, 56
— v. Cummings	4, 57	— v. Downing	151
— v. Evans	87, 88	— v. Gilbert	215
— v. Haven	260	— v. Marsiglia	250
— v. McGran	271	— v. Newsam	93
— v. Memphis & C. R. R. Co.	293	— v. Pinney	246
— v. Muller	243	Clason v. Baldwin	203
— v. Swineford	87, 88	Clements v. Schuylkill, &c. R. Co.	281
— v. Watson	197		
Bruce v. Coleman	220		
— v. Learned	186		

## TABLE OF CASES.

xiii

	Page		Page
Clow v. Brogden	310	Dawson v. Morgan	261
Cockburn v. Alexander	283	Day v. Woodworth	85
Coffey v. National Bank of Mo.	179	DeForest v. Fulton F. Ins. Co.	264
Coggs v. Bernard	93, 278	Delevan v. Bates	143
Coil v. Wallace	307	Demarest v. Little	177
Collard v. Southeastern Ry. Co.	286	Deming v. Grand Trunk R. R. Co.	288
Collingridge v. Royal Exch. Ass. Co.	264	Dennis v. Barber	179
Colwell v. Foulks	281	— v. Maxfield	28
Commonwealth v. Porter	4	Denny v. N. Y. Central R. R. Co.	46
Congregation Beth Elohim v. Central Presb. Church	819	Denver & R. G. Ry. v. Harris	91
Conner v. Reeves	256	De Tastett v. Crouisillat	273
Cook v. Curtis	817	Devereux v. Burgwin	233
— v. Fowler	134	Deverill v. Burnell	234, 235
Coolidge v. Neat	306	Dicken v. Shepherd	159
Corlies v. E. W. Walker Co.	164	Dickson v. Reuter's Tel. Co.	294
Cortelyou v. Lansing	142	Dimmick v. Lockwood	316
Cory v. Thames Iron Works	246	Dodge v. Perkins	128, 134, 137
Costigan v. Mohawk & H. R. R. Co.	80	Doe v. Filliter	203, 204
Cotterell v. Jones	198	— v. Perkins	204
Cowden v. Wright	168	Donahoe v. Emery	317
Cowdry v. Carpenter	228	Dorsey v. Moore	114
Cowing v. Cowing	171	Dougherty v. Stepp	192
Croker v. Chicago & N. W. Ry. Co.	90, 102	Dow v. Humbert	118
Crouch v. Great Northern Ry. Co.	281	Dubois v. Hermance	259
Cuff v. Newark & N. Y. R. R. Co.	48	Du Bost v. Beresford	126
Cumberland & O. Canal Co. v. Hitchings	198	Duckworth v. Alison	231
Curry v. Larer	223	Duffield v. Scott	260
Curtis v. Baugh	258	Duke of Brunswick v. Slowman	191
— v. Rochester & S. R. R. Co.	112, 154	Dullaghan v. Fitch	224, 225
Cutting v. Grand Trunk Ry. Co.	286	Durst v. Swift	227
		Dustan v. McAndrew	247
Daggett v. Davis	181	Duval v. Davey	161
Dakin v. Williams	230	Eakin v. Scott	226
Dalton v. Beers	85	East & West I. D. & B. J. Ry. Co. v. Gattke	14
— v. Southeastern Ry. Co.	174	Easton v. Penna. & O. Canal Co.	224
Damon v. Moore	170	Eaton v. Boissonnault	134
Dana v. Fiedler	136, 243	Eddy v. Coffin	309
Danziger v. Boyd	205	Edwards v. Leavitt	88
Darley Main Colliery Co. v. Mitchell	112	Ege v. Kille	205
		Ehr Gott v. The Mayor	28, 53, 55
		Elbinger Actien-Gesellschaft v. Armstrong	70
		Elizabethtown & P. R. R. Co. v. Geoghegan	224
		Ellington v. Ellington	169
		Elliott v. Hayden	178

	Page		Page
<i>Elliott v. Van Buren</i>	88	<i>Friedland v. Myers</i>	211
<i>Ellis v. Hilton</i>	7, 79	<i>Frierson v. Hewitt</i>	163
<i>Elmer v. Fessenden</i>	117	<i>Fritz v. Hobson</i>	195, 197
<i>Elwood v. Western Un. Tel. Co.</i>	298	<i>Fromm v. Ide</i>	77
<i>Emblem v. Myers</i>	85	<i>Frost v. Knight</i>	249
<i>Emery v. Smith</i>	213	<i>Frothingham v. Moore</i>	179
<i>Evanisch v. Gulf C. &amp; S. F. Ry. Co.</i>	168	<i>Fuller v. Rice</i>	213
<i>Everson v. Powers</i>	238	<i>Fry v. Bennett</i>	87
<i>Fairfax v. N. Y. Central &amp; H. R. R. Co.</i>	125	<i>Gallagher v. Jones</i>	183
<i>Farnsworth v. Boardman</i>	255	<i>Gammon v. Howe</i>	229
<i>Faulkner v. Closter</i>	242	<i>Ganssly v. Perkins</i>	92
— <i>v. Hart</i>	283	<i>Gee v. Lancashire &amp; Y. Ry. Co.</i>	64
<i>Fay v. Guynon</i>	111	<i>Geiger v. Western Md. R. R. Co.</i>	224
— <i>v. Parker</i>	86, 88	<i>Gibbs v. Cruikshank</i>	50, 62, 109
<i>Fearing v. Clark</i>	241	<i>Gilbert v. Berkinshaw</i>	2
<i>Featherston v. Wilkinson</i>	282	— <i>v. Wiman</i>	255, 257
<i>Fell v. Northern Pac. R. R. Co.</i>	106	<i>Gilligan v. N. Y. &amp; Harlem R. R. Co.</i>	168
<i>Ferris v. Comstock</i>	28	<i>Gilman v. Noyes</i>	58, 60, 61
<i>Fetter v. Beal</i>	112	<i>Gilmore v. Driscoll</i>	194
<i>Finckh v. Evers</i>	259	<i>Glaspy v. Cabot</i>	125
<i>Finlay v. Chirney</i>	303	<i>Gleason v. Pinney</i>	235
<i>First Nat. Bank v. Fourth Nat. Bank</i>	271, 273	<i>Goddard v. Grand Trunk Ry. Co.</i>	85
<i>Flagg v. Roberts</i>	162	<i>Goodtitle v. Tombs</i>	202
<i>Fleming v. Beck</i>	49	<i>Gordon v. Brewster</i>	238
<i>Fletcher v. Dyche</i>	231	— <i>v. Swan</i>	128
— <i>v. Rylands</i>	23	<i>Gore v. Brazier</i>	312
<i>Florida Southern Ry. Co. v. Hirst</i>	94	<i>Grable v. Margrave</i>	170
<i>Flureau v. Thornhill</i>	320	<i>Graham v. Bickham</i>	218
<i>Folsom v. Apple R. L. D. Co.</i>	194	<i>Grand Rapids Booming Co. v. Jarvis</i>	114
<i>Foos v. Sabin</i>	249	<i>Grand Tower Co. v. Phillips</i>	6, 124, 208, 245
<i>Forbes v. Boston &amp; L. R. R. Co.</i>	289	<i>Grand Trunk Ry. Co. v. Jennings</i>	174, 175
<i>Forsyth v. Wells</i>	17, 118, 182	<i>Greaves v. Ashlin</i>	244
<i>Fowler v. Gilman</i>	115	<i>Grébert-Borgnis v. Nugent</i>	70
— <i>v. Old North State Ins. Co.</i>	262	<i>Greely, S. L. &amp; P. Ry. Co. v. Yeager</i>	86
<i>Fox v. Boston &amp; Me. R. R. Co.</i>	67	<i>Green v. Boston &amp; L. R. R. Co.</i>	125
<i>France v. Gaudet</i>	62, 124, 183	<i>Greene v. Goddard</i>	29, 36
<i>Franklin v. South Eastern Ry. Co.</i>	174	<i>Greer v. New York</i>	114
<i>Frazer v. Bigelow Carpet Co.</i>	137	— <i>v. Tweed</i>	231
<i>Freer v. Cowles</i>	185	<i>Gregory v. Mc Dowel</i>	244
<i>Frick v. St. Louis, K. C. &amp; N. Ry. Co.</i>	168	<i>Griffey v. Kennard</i>	205
		<i>Griffin v. Colver</i>	6, 17, 24, 26, 29
		<i>Grindle v. Eastern Exp. Co.</i>	78

## TABLE OF CASES.

XV

	Page		Page
Grinnell v. Western Un. Tel. Co.	204	Hixon v. Hixon	238
Grose v. Hennessey	254	Hixt's Case	2
Grosso v. Delaware L. & W. R. R. Co.	172	Hoadley v. Northern Transp. Co.	54
Guille v. Swan	46	Hoagland v. Segur	283
Gust v. Macpherson	88	Hobbs v. London & S. W. Ry. Co.	23, 64, 67, 97, 291
		Hochster v. De la Tour	249
Hadley v. Baxendale	6, 17, 66, 152, 210, 239, 245, 303	Hodgkins v. Price	118, 206
Haggart v. Morgan	218	Hodgson v. Wood	256
Hahn v. Horstman	231	Holcomb v. Wyckoff	241
Haines v. Schultz	91	Holden v. Trust Co.	134
Hales v. London & N. W. Ry. Co.	287	Holsapple v. Rome, W. & O. R. R. Co.	278
Ham v. Goodrich	213	Honore v. Lamar F. Ins. Co.	265
Hamilton v. McPherson	77	Hooker v. Newton	86
Hamlin v. Great Northern Ry. Co.	76, 97	Hopkins v. Lee	321
Hammer v. Schoenfelder	68	Hopple v. Higbee	117
Hammond v. Bussey	64, 71	Horne v. Midland Ry. Co.	287
Hanson v. European & N. A. R. R. Co.	91, 155	Hosking v. Phillips	194
Hare v. Grant	259	Hough v. People's F. Ins. Co.	264
Harlow v. Thomas	316	Hovey v. Page	304
Harrington v. Murphy	817	Howe S. M. Co. v. Bryson	24
Harris v. Panama R. R.	125	Howell v. Moores	317
Harrison v. Berkley	56	Huber v. Teuber	88
— v. Ely	85, 102	Huckle v. Money	85, 86
— v. Wright	218, 219	Hunt v. O'Neill	203
Hartford & S. Ore. Co. v. Miller	314	Hunter v. Prinsep	179
Harvey v. Conn. & P. R. R. Co.	280	Hutchins v. Hutchins	199
Haseltine v. Guild	257	Hutchinson v. Snider	83
Heard v. James	187	Hyatt v. Adams	172
Hefley v. Baker	92	Hydraulic Engineering Co. v. McHaffie	69
Heine v. Meyer	215	Hylton v. Brown	118
Hemminger v. Western Assur. Co.	214		
Henry v. Flag	138	I. de S. v. W. de S.	105, 151
Herraschoff v. Tripp	204	Illinois Cent. R. R. Co. v. Cobb	276, 287
Hetherington v. North-eastern Ry. Co.	174	Indianapolis B. & W. Ry. Co. v. Birney	78
Hexter v. Knox	310	Indianapolis, P. & C. Ry. Co. v. Pitzer	58
Hibbard v. Western Un. Tel. Co.	82	Ingalls v. Bills	79
Hickman v. Haines	248	Ingledeu v. Northern R. R. Insurance Co. v. Updegraff	287
Higginson v. Weld	280	Insurance Cos. v. Thompson	259
Hill v. Smith	245	International Trust Co. v. Boardman	265
Hinde v. Liddell	69	Ionides v. Universal M. I. Co.	63
Hinton v. Sparkes	226	Jackson v. Wood	206
		James v. Hodsden	212

	Page		Page
Jefferson v. Adams	88	Lea v. Whitaker	226
Jemmison v. Gray	224	Le Blanche v. London & N.	
Jenkins v. Jones	817	W. Ry. Co.	76, 79, 292
Jennings v. Grand Trunk Ry.	279	Ledyard v. Jones	190
— v. Rundall	158	Leeds v. Cook	308
Jewett v. Whitney	17, 82	— v. Metropolitan G. L.	
Johnson v. Jenkins	308	Co.	30
— v. Smith	88	Legge v. Harlock	281
— v. Wells, Fargo & Co.	106	Leigh v. Paterson	249
Johnston v. Crawford	88	Leonard v. New York, A. &	
Jones v. Boyce	76	B. E. M. T. Co.	77, 299
		Lindsey v. Danville	168
Kadish v. Young	249	— v. Parker	259
Keeble v. Keeble	227	Lipe v. Eisenlerd	109
Kelley v. Riley	307	Little v. Banks	229, 233
Kelly v. Town of Bradford	215	— v. Boston & Me. R. R.	
Kemble v. Farren	225	Co.	51
Kernochan v. N. Y. Bowery		Livingstone v. Rawyards	
F. Ins. Co.	265	Coal Co.	182
Kiley v. Western Un. Tel. Co.	294	Locke v. Homer	256, 257
Kille v. Ege	205	Loker v. Damon	74, 78
Kimball v. Holmes	105	Long v. Conklin	243
King v. Root	155	Loosemore v. Radford	256
— v. State M. F. Ins. Co.	261, 265	Lord v. Staples	259
	307	Lord Townsend v. Hughes	2, 3
Kniffen v. McConnell	142	Louisville & N. R. R. Co. v.	
Knight v. Egerton	61, 62	Brooks	86
— v. Wilcox	124	— v. Wallace	155
Kountz v. Citizens' Oil R. Co.	124	Lowe v. Peers	229
— v. Kirkpatrick	121, 123, 124	Lowery v. Manhattan Ry. Co.	55
Kreuziger v. Chicago & c. R.		Lucas v. Trumbull	181
Co.	58	Lyle v. Barker	115
		Lynch v. Knight	98, 99, 158, 160, 297
La Coursier v. Russell	238	— v. Nurdin	56
Laffin v. Willard	84	Lynn Gas & El. Co. v. Meri-	
Laird v. Pim	819, 820	den F. I. Co.	63
Lake v. Milliken	58		
Lake Shore & M. S. Ry. Co.			
v. Frantz	97	McCarthy v. De Armit	93
— v. Prentice	91	McDonald v. Snelling	56
Lampman v. Cochran	226	McGuffey v. Humes	318
Lancashire & Y. Ry. Co. v.		McHose v. Fulmer	25
Gidlow	281	McInnis v. Lyman	314
Larned v. Hudson	203	McLean County Coal Co. v.	
Larson v. Chase	106	Long	118
Lattimore v. Simmons	304	McMahon v. Field	291
Laurent v. Chatham F. Ins. Co.	263	— v. N. Y. & Erie R. R.	
— v. Vaughn	289	Co.	136
Law v. Local Board of Red-		McMaster v. State	133
ditch	231	McWilliams v. Bragg	102
Lawrence v. Cooke	306	Mace v. Ramsey	282
— v. Rice	84	Magnin v. Dinsmore	278, 283

TABLE OF CASES.

xvii

	Page		Page
Maguire v. Middlesex R. R. Co.	4	Morrison v. Davis	53
Mahan v. Brown	21	Mulliner v. Florence	180
Mahoney v. Belford	161	Murdock v. Boston & A. R. R. Co.	102
Mahurin v. Bickford	138	Murphy v. Fond du Lac	17
Malachy v. Sloper	161	— v. Hobbs	88
Malone v. City of Philadelphia	231	Murray v. Gast Lith. & E. Co.	164
Maloney v. Nelson	256	Mutual Safety Ins. Co. v. Hone	266
Manly v. Field	168		
Manvell v. Thomson	61, 169, 170		
Margraf v. Muir	320, 321		
Markham v. Russell	158	National Prov. Bank v. Marshall	230
Marsh v. McPherson	51	Nelson v. Plimpton F. P. E. Co.	215, 280
Martin v. Porter	182	Newark Coal Co. v. Upson	31
Masterton v. Mayor of Brooklyn	27, 211	Newman, <i>In re</i>	226
— v. Mount Vernon	30	New Orleans, St. L. & C. R. R. Co. v. Burke	86
Mather v. American Exp. Co.	67	New World (The) v. King	93
Mathews v. Sharp	226	New York Rubber Co. v. Rothery	82
Maxwell v. Allen	229	Nichol v. Thompson	128
Mayo v. Springfield	117	Nickerson v. Wheeler	144
Mead v. Wheeler	229, 233	Norristown v. Moyer	117
Meagher v. Driscoll	106	Notara v. Henderson	284
Meidel v. Anthis	89, 92	Nowell v. Roake	203
Merryweather v. Nixan	144	Noyes v. Phillips	218
Michigan L. & I. Co. v. Deer Lake Co.	88	Nye v. Merriam	198
Mickles v. Hart	84		
Middlekauff v. Smith	310	Oelrichs v. Spain	36
Milburn v. Belloni	251	Ogden v. Marshall	221, 280
Milhau v. Sharp	197	O'Hanlon v. Great Western Ry. Co.	124
Millard v. Brown	92	Old Colony R. R. Co. v. Miller	137
Miller v. Johnson	162	Orr v. Churchill	232
— v. Mariners' Church	74	Osborn v. Lovell	143
— v. Rosier	306, 308	Osgood v. Osgood	257, 258
Mills v. Dow	256		
— v. East London Union	310		
Milwaukee & St. P. Ry. Co. v. Arms	85, 98		
— v. Kellogg	57, 59		
Mitchell v. Stanley	316		
Mobile & M. Ry. Co. v. Gilmer	311	Packard v. Slack	251
Monmouth Park Ass'n v. Wallis Iron Works	231	Paine v. Caswell	134
Montgomery v. Reed	313	Palmer v. Wick & P. S. S. Co.	144
Moody v. Whitney	119	Parana, The	239
Moore v. Manufacturers' Nat. Bank	156	Parker v. Eagle F. Ins. Co.	263
— v. Meagher	160	— v. Peabody	191
Morrell v. Irving F. Ins. Co.	235	— v. Russell	111
Morrison v. Berkey	258	Parrott v. Knickerbocker Ice Co.	137

	Page		Page
Passinger v. Thorburn	24, 251	Railroad Co. v. Jones	75
Paul v. Frazier	305	— v. Lockwood	276, 278
Paulmier v. Erie R. R. Co.	175	Randall v. Hazelton	199
Peak v. Frost	253	Ranger v. Great Western Ry.	224
Pearson v. Duane	230, 293	Co.	224
— v. Williams' Admrs.	234	Ransom v. N. Y. & Erie R. R.	97, 154
Peek v. Derry	252	Co.	97, 154
Pegram v. Stortz	89	Rathbone v. N. Y. Cent. &	283
Pennsylvania R. R. Co. v.		H. R. R. R. Co.	283
Allen	154	Redmond v. American Mfg.	125, 189
— v. Kerr	59	Co.	125, 189
— v. McCloskey	175	Reed v. Davis	88
— v. Titusville & P. P. R.		Reid v. Fairbanks	182
Co.	281	Reilly v. Jones	226
Perkins v. N. Y. Central R.		Renfro v. Hughes	181
R. Co.	93	Richards v. Citizens' Natural	137
— v. Pitman	191	Gas Co.	137
Perrott v. Shearer	117	— v. Edick	230, 320
Peters v. Barnhill	259	Richardson v. Mason	250
Philadelphia & R. R. R. Co.		Richmond & D. R. R. Co. v.	30
v. Derby	290	Elliott	30
Phillips v. Coast	205	Riewe v. McCormick	86
— v. London & S. W. Ry.		Ring v. Cohoes	54
Co.	3	Ripley v. Mosely	259
— v. South Western Ry.		Roberts, <i>In re</i>	184
Co.	97, 142, 154	— v. Roberts	160
Piper v. Kingsbury	807	— v. White	220
Pitcher v. Livingston	313	Robinson v. Bland	127
Pitt v. Donovan	161	— v. Kime	88
Pittsburg Coal Co. v. Foster	72	— v. Waupaca	154
Playford v. United Kingdom		Rochester Lantern Co. v.	71
E. T. Co.	294	Stiles & P. Press Co.	71
Plummer v. Penobscot Lumb.		Rockwood v. Allen	17, 23
Assoc.	80	Rodocanachi v. Milburn	282
Pollard v. Lyon	159	Romaine v. Allen	182
— v. Photographic Copy-		Roper v. Johnson	110, 249
ing Co.	164	Rose v. Miles	197
Pond v. Harris	38	— v. Story	191
Portsmouth Ins. Co. v. Brazee	269	Rosenfield v. Express Co.	289
Postal Tel. Cable Co. v.		Rowland's Admrs. v. Shelton	253
Lathrop	300	Rudder v. Price	127
Potter v. McPherson	224	Russel v. Palmer	2
Power v. Harlow	154	Ryan v. N. Y. Central R. R.	59
Priestly v. Northern Ind. &		Co.	59
C. R. R. Co.	288	Ryerson v. Chapman	39
Primrose v. Western Un.		St. Johnsbury & L. C. R. R.	51
Tel. Co.	295, 301	Co. v. Hunt	51
Pym v. Great Northern Ry.		St. Louis, A. & R. I. R. R.	219
Co.	175	Co. v. Coultas	219
Railroad v. Wallace	130, 187	Salisbury v. Western N. C.	113
Railroad Co. v. Barron	175	R. R. Co.	113

## TABLE OF CASES.

xix

	Page		Page
Salladay v. Dodgeville	78	Spring v. Haskell	284
Sangamon & M. R. R. Co. v. Henry	284	Squire v. Western Un. Tel. Co.	49, 208
Sauter v. N. Y. Cent. & H. R. R. R. Co.	48	Staats v. Ten Eycks' Exrs.	813
Savannah & C. R. R. Co. v. Callahan	224	Stacy v. Portland Pub. Co.	92
Savile v. Roberts	162	Startup v. Cortazzi	246
Sawyer v. Dean	248	Stearns v. Sampson	158
Sayre v. Sayre	161	Stebbins v. Palmer	304
Schlitz Brewing Co. v. Compton	112	Sterns v. Low	179
Schrimpf v. Tennessee Mfg. Co.	232	Stevens v. Dudley	53, 55
Schuyler v. Curtis	164	Stewart v. Drake	316
— v. Sylvester	220	— v. Maddox	88
Scott v. Boston & N. O. S. S. Co.	286	Stickney v. Allen	125
— v. Shepherd	47, 149	Stillwell v. Staples	264
Shannon v. Comstock	319	Stimson v. Farnham	84
Sharp v. Powell	53	Stocking v. Sage	274
Sherman v. Hudson River R. R. Co.	286	Storer v. Eaton	273
— v. Rawson	307	Stowe v. Buttrick	213
Sherwood v. Chicago & W. M. Ry. Co.	154	Streeper v. Williams	228
Shipperd v. Field	274	Strohm v. N. Y. Lake Erie & W. R. R. Co.	112
Shipp v. Story	156	Strong v. Manufacturers' Ins. Co.	265
Shippen v. Bowen	251	Sussex Co. Mut. Ins. Co. v. Woodruff	265
Shook v. Peters	88	Sutherland v. Wyer	79, 238
Short v. Kalloway	260	Suydam v. Jenkins	183, 188
Shute v. Taylor	227	Swift v. Dickerman	105
Simpson v. Griffin	261	— v. Powell	226
Single v. Schneider	118	Taft v. Travis	247
Sloan v. Edwards	51	Tarleton v. McGawley	51
Smith v. Bergengren	234	Taylor v. Sandiford	228
— v. Berry	244	Taylor v. Morgan	179
— v. Bolles	252	Temperton v. Russell	206
— v. City of St. Joseph	167, 168	Tempest v. Kilner	244
— v. Compton	260	Tennessee Mfg. Co. v. James	232
— v. Green	251	Terry v. Hutchinson	168, 170
— v. Griffith	120, 121	Terwilliger v. Wands	104, 105
— v. Holcomb	155	Thayer v. McManis	179
— v. Judkins	191	— v. Murray	178
— v. Peat	310	Thomas v. Winchester	56
— v. Sherman	304	Thomas B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co.	8, 25, 71, 79
Smithwick v. Ward	88	Thompson v. Boston & Me. R. R. Co.	134
Snell v. Delaware Ins. Co.	268	— v. Hudson	224
Snow v. Carpenter	86	— v. Rose	218
Southard v. Rexford	307	— v. Western Un. Tel. Co.	209
South Park Comrs. v. Dunlevy	137	Thurston v. Hancock	194
Sowers v. Sowers	88	Tilly v. Hudson River R. R. Co.	175
Spooner v. Holmes	179		

	Page		Page
Tobin v. Harford	269	Wabash, St. L. & P. Ry. Co.	
Tode v. Gross	228	— v. Rector	86
Tone v. Wilson	314	Wadsworth v. Western Un.	
Torry v. Black	117	Tel. Co.	101, 107, 301
Townsend v. Hughes	2, 3	Walker v. Constable	128
Trenton M. L. & F. Ins. Co.		— v. Cronin	206
— v. Johnson	270	— v. Smith	23
Trinity Church v. Higgins	256	Wall v. City of London R.	
Tripp v. Thomas	159	P. Co.	5
True v. International Tel. Co.	298	Wallace v. Berdell	206
Trull v. Granger	809	Wallis v. Smith	226
Tufts v. Adams	317	Ward v. Hudson River	
Tully v. Harloe	187	Bldg. Co.	231
Tunbridge Wells Dipper's Case	199	Ward's C. & P. L. Co. v.	
Tuttle v. White	187	Elkins	280
Tyler v. Bailey	212	Washington Mills Mfg. Co.	
— v. Salley	305	— v. Weymouth Ins. Co.	263
		Waterman v. Chicago & A.	
		R. R. Co.	58, 155
		Waters v. Monarch F. & L.	
		Ass. Co.	264
Underhill v. Agawam M. F.		Watriss v. Cambridge Bank	310
Ins. Co.	262	Watson v. Moore	157
Union Bank v. Blanchard	215	— v. Watson	305
Union Inst. for Savings v.		Watts v. Camors	225
Boston	134	Webb v. Portland Mfg. Co.	22
United Merthyr Collieries		Wegner v. Second Ward	
Co., <i>In re</i> ,	182	Sav. Bank	188
United States v. Behan	211	Wehle v. Haviland	181
— v. Smith	23	Welch v. Anderson	64, 67
United States Express Co. v.		Western Mfg. Co. v. The	
Haines	288	Guiding Star	284
United States Telegraph Co.		Western Union Tel. Co. v.	
v. Wenger	298	Crall	300
United States Trust Co. v.		— v. Hall	29, 300
O'Brien	64	— v. Henderson	301
Usher v. Noble	268	— v. Rogers	106, 301
		Westfield v. Mayo	39, 260
		West Mahanoy v. Watson	58
Valentine v. Wheeler	257	Weston v. Grand Trunk Ry.	
Van Brocklen v. Smeallie	248	Co.	286
Vandenburgh v. Truax	55	Whipple v. Wanskuck Co.	194
Vanderpool v. Richardson	101	White v. Miller	132, 133, 136
Vandervoort v. Gould	204	— v. Nellis	61, 170
Van Rensselaer v. Jewett	136	Whitney v. Allaire	252
Van Winkle v. Wilkins	68	Wichita & W. R. R. Co. v.	
Vicksburg & M. R. R. Co. v.		Beebe	111
Putnam	153	Wicker v. Hoppock	255
Victorian Ry. Comrs. v.		Wilkinson v. Ferree	253
Coultas	107	Williams v. Archer	185
Vogel v. McAuliffe	106	— v. Esling	192
Voltz v. Blackman	155	— v. Hays	16
Vosburg v. Putney	56	— v. Hill	160

## TABLE OF CASES.

xxi

	Page		Page
Williams v. Mostyn	84	Woodger v. Great Western	288
— v. Vanderbilt	55, 292	Ry. Co.	205
— v. Woods	244	Woodhull v. Rosenthal	250
Wilson v. Brett	93	Woodward v. Powers	182
— v. Lancashire & Y. Ry.	284	Wright v. Bank of the Me-	30
Co.	68	tropolis	107
— v. Newport Dock Co.	156	— v. Mulvaney	
— v. Noonan	92	Wyman v. Leavitt	
— v. Vaughn	119, 143		
Winchester v. Craig	249		
Windmuller v. Pope	31	Yates v. N. Y. Central & H.	92
Winslow v. Lane	29	R. R. Co.	309
Wolcott v. Mount	77, 80	Yeager v. Weaver	227
Wolf v. Studebaker	220	Yenner v. Hammond	171
Wood v. State	82	Yundt v. Hartrunft	
— v. Waud			



# ELEMENTS OF DAMAGES.

---

## INTRODUCTION.

THE modern development of the law has been marked by a growing attention to the subject of DAMAGES. Fifty years since, there existed but a single text-book on this title of the law; in the United States there was none. Since then, not only have a number of systematic treatises made their appearance, but the Reports, with their constantly increasing harvest of decisions, have proved that for some inherent reason this branch of the law of redress commands a position not previously held by it. Its recent introduction into the courses of more than one law school shows that, besides its importance in actual practice, it has begun to attract notice as a subject deserving the attention of students.

The explanation of the fact which lies on the surface is, that the body of rules laid down by the courts as to damages is of comparatively recent growth. But a question of considerable interest is, Are the causes which have produced these rules of a permanent character, or is their growth merely a transitory phenomenon in the development of the law? The answer may serve to throw some light upon the principles underlying the whole subject. It seems to be closely connected with the division in our system between law and fact, and the separation of the functions of court and jury.

Originally the jury, now a tribunal of fact, summoned to hear the testimony offered by the parties, to decide upon its credibility, and, under the guidance of the court, to find the facts in the case necessary to its correct decision, had no such function. Trial by jurors was resorted to because they were persons supposed to be already cognizant of the matter in dispute,<sup>1</sup> and they seem to have been in consequence clothed with a practically absolute power as to the amount of compensation. This power has been, in process of time, for the most part slowly transferred to the courts, the greater part of the change having been accomplished within a very modern period. In a comparatively recent case<sup>2</sup> they are still said to be "chancellors;" in another<sup>3</sup> they are said to be "proper judges" of what the damages are; and as late as the time of Lord Mansfield we find counsel stating the law to be that "the court cannot measure the ground on which the jury find damages that may be thought large,"<sup>4</sup> — a statement which embodies a proposition directly the opposite of the general rule now governing the subject.

Strange as this early arbitrary power of the jury now seems, it is not difficult to account for it when we reflect that all our early civil law was a law of torts.<sup>5</sup> When trial by jury was introduced, the common form of action for the redress of wrongs was trespass; the whole subject of contract was yet to come into existence, and as the machinery of modern proof had not been invented, there was no other way of ascertaining what damage had been done than that of asking the jury. Its answer was final. A considerable portion of this arbitrary power

<sup>1</sup> 1 Reeves' Eng. Law, 328; 2 id. 270.

<sup>2</sup> Sir Baptist Hixt's case, 2 Rol. Abr. 703, p. 15.

<sup>3</sup> *Ld. Townsend v. Hughes*, 2 Mod. 150.

<sup>4</sup> *Gilbert v. Berkinshaw*, Lofft. 771; *Russel v. Palmer*, 2 Wils. 325.

<sup>5</sup> 1 Pollock and Maitland's Hist. of Eng. Law, 15, 21, 34.

remains in its hands even to-day; for while, in the development of contract, the rules of recovery have become more and more matter of law, the jury in tort still retains, within certain limits, its ancient prerogative, and in libel, slander, assault and battery, and all personal actions the damages are said to be "at large."<sup>1</sup>

As long as the jury performed its early function, there could be no law of damages properly so called. Each verdict stood by itself, based on facts which were perhaps never even brought to the knowledge of the court. A law of damages must consist of uniform rules applicable to various classes of cases; and such rules cannot be uniform unless the court is compelled to lay them down and the jury is compelled to apply them. For the development of such a system it was necessary, first, that the court should obtain control over the machinery of proof; second, that it should find means of making the verdict conform to a standard of damages derived from legal principles; third, that these legal principles, once enunciated, should be binding upon itself. In modern procedure all these requirements are met.

The essential peculiarities of this procedure are, that the jurors have become a special tribunal to decide questions of fact, not from their own knowledge, but upon the testimony of witnesses; that they may consider only such testimony as the court, in accordance with fixed rules of law, decides to be admissible; that they find the facts in accordance with certain rules laid down by the court; that the parties are entitled at every stage of a trial to

<sup>1</sup> In *Lord Townsend v. Hughes*, above, a case of *scandalum magnum*, in which the judges of the Common Pleas refused to set aside a verdict of £4,000 as excessive, one of them mentions as a palpable absurdity the idea of giving a new trial for scandalously inadequate damages; in such a case at the present day the verdict is not allowed to stand. *Phillips v. L. & S. W. Ry. Co.*, 5 Q. B. D. 78.

explicit decisions by the court upon the admissibility of evidence, and at its close to definite instructions to the jury upon propositions of law offered by them; and finally, that upon review or appeal the correctness of some one or more of these decisions or instructions, or of the conformity of the verdict with them, determines the vital question whether the verdict shall stand or whether the case shall be tried anew.

In the language of Shaw, C. J.,<sup>1</sup> "it is the duty of the judge to instruct and direct the jury, authoritatively, upon such questions of law as may seem to him to be material for the jury to understand and apply in the issue to be tried; and he may also be required so to instruct upon any pertinent question of law within the issue, upon which either party may request him to instruct. . . . If such instruction be either given or refused, it is the duty of the judge to state it in a bill of exceptions, so that it may be placed on the record; and if the verdict is against the party who took the exception, and it appears, upon a revision of the point of law, that the decision is incorrect, either in giving or refusing such instruction, the verdict is set aside as a matter of course." The same statement may be made as to rulings upon evidence in the course of a trial, whenever it can be seen that, had the evidence excluded been admitted, or had the evidence admitted been excluded, the resulting verdict might have been different.<sup>2</sup>

<sup>1</sup> *Com. v. Porter*, 10 Met. 263, 277.

<sup>2</sup> 1 Greenl. Ev. (15th ed.) § 584, no. 2. So strict is this rule that it has been held that even if the improper evidence was not noticed by counsel on either side in addressing the jury, nor by the court in instructing them, still the verdict cannot stand, for once admitted against the objection of counsel, the jury had a right to regard it; *i. e.*, the verdict *may* have been affected by it. *Brown v. Cummings*, 7 All. 507; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239.

The effect of this system is to produce a continuously increasing body of rules, and in no branch of the law is this more obvious than in that which affects every verdict rendered by a jury, — the measure of damages. The means by which these rules are produced, and the reason they remain fixed in the law can best be seen by one or two examples.

The general principle in all actions for breach of contract is that the verdict must give the plaintiff in damages the difference between what he would have had, if the contract had been performed, and what he actually has received.<sup>1</sup> The plaintiff, for instance has been deprived of the use of an article; he is entitled to the value of the use of it. But a case arises involving a somewhat novel fact. The loss of this use entails a secondary loss, — the loss of profits. Can he recover these? On the trial, the evidence of the profits he might have made, had he had the article, is admitted; the case is left generally to the jury, and a verdict is found which includes the conjectured profits. A new trial is applied for, on the ground of misdirection, and the question is presented for argument, What should the judge have charged as to *consequential damages*, — that is, damages not directly resulting from the act complained of, but still a consequence of it? The result reached is that for breach of contract the damages should be "such as may fairly and reasonably be considered either arising naturally — that is, according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it;" that the profits claimed would not come within either branch of this rule; that the judge

<sup>1</sup> Wall v. City of London R. P. Co., L. R. 9 Q. B. 249.

ought to have told the jury so, and that there must therefore be a new trial.<sup>1</sup>

The first result of this case is, that a new rule is added to the body of rules relating to contracts, which does not merely decide this particular case, but which the court can be required to state to the jury in all future cases in which consequential damages are claimed. This rule, never explicitly laid down till within fifty years, becomes an indispensable guide in cases of contract, and the foundation of the whole law of consequential damages.

In another case, the allowance of profits is considered from another point of view. Proof is offered of what might have been earned by the use of an engine which has not been delivered. This is held not to be the proper measure of damages, and on appeal this view is sustained, on the ground that damages "must be certain, both in their nature and in respect to the cause from which they proceed." In New York, and all the various jurisdictions which follow this decision, the rule of Certainty is added to the rule in *Hadley v. Baxendale*, and to the fundamental rule that the plaintiff is entitled to be put by the verdict in the position he would have occupied, had the contract not been broken.<sup>2</sup>

In the law of sales, the general rule has been established for a long time, that when the seller fails to deliver, the buyer recovers the difference between the contract price and the market value of the article sold, at the place of delivery. A case arises in which there is no market value at the place of delivery. A new rule is formulated to cover such cases, and is added as a qualification, for future cases of the kind, of the general rule.<sup>3</sup>

Questions such as these, growing out of the application

<sup>1</sup> *Hadley v. Baxendale*, 9 Ex. 341.

<sup>2</sup> *Griffin v. Colver*, 16 N. Y. 489, 495.

<sup>3</sup> *Grand Tower Co. v. Phillips*, 23 Wall. 471.

of some existing rule to new states of facts, have arisen, and have been presented to the courts in the form of requests for instructions to the jury, or offers of, or objections to, proof; the courts have been obliged to pass upon them, and the answers, embodied in a great array of cases, formulate modifications or qualifications of the rule applicable to various states of fact. If we turn our attention to invasions of property, or personal rights, we shall find the same process going on, — a rule evolved by the application of some admitted principle to a new state of facts, or to an old state of facts looked at from a new point of view, adopted by the courts as a rule of law, and therefore added to the body of rules already in existence as binding upon juries and courts, an erroneous statement of which will result in a mistrial. In this way the consideration of the subject of exemplary damages produces one set of rules, that of interest another, avoidable consequences a third.

The germ of a rule may sometimes be seen where no rule has yet been reached. It is a general rule of law that the plaintiff cannot recover for damages caused by an injury, if he might, by reasonable care or expense, have avoided them, and that he may hold the defendant for reasonable expenses incurred in avoiding them. In *Ellis v. Hilton*,<sup>1</sup> an action for injury to a horse, in which the plaintiff was allowed to recover, in addition to the value of the horse, the expenses of an attempted but unsuccessful cure, after saying that such expenses must be reasonable, the court goes on, "No one would be justified under any circumstances in expending more than the animal was worth in attempting a cure." The head-note lays it down as a proposition of law, that in such a case the recovery "can never exceed in amount the value of the animal." It requires but a slight stretch of the

<sup>1</sup> 78 Mich. 150.

imagination to make it an actual rule of law. A case arises in which the plaintiff has run up a bill for the expenses of cure in excess of the value. The defendant requests that the jury be instructed that the measure of damages on this head cannot exceed the value. The judge, at the trial, may refuse the request, and simply give the jury the existing general rule, — that such expenses must be reasonable. This leaves it to the jury to decide, as a matter of *fact*, whether an expense in excess of the value is reasonable, and if their verdict stands, the law remains as at present. But if the verdict is for a sum in excess of the value, and a proper exception has been taken to the refusal of the instruction prayed for, the question will be presented on appeal, whether it is or is not a rule of law that the cost cannot exceed the value. If a new trial is granted on this ground, the ruling suggested will become a matter of right in future trials. The principle, if sound, is obviously involved in the rule of reasonableness, which again is involved in the rule of avoidable consequences. Once explicitly laid down, however, in this way, it is a new rule, expressly added to the substance of the law.<sup>1</sup>

As society never remains in a state of equilibrium, but is subject to a constant law of change, which is from time to time modifying its customs and habits, and bringing up for the consideration of the courts novel states of fact, and, moreover, as we are ourselves continually modifying the law by legislation, every generation sees the addition of new rules. The introduction of the Telegraph has necessitated a revision of the law of damages, so far as

<sup>1</sup> Cf. *Thomas B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co.*, 62 Wis. 642, where it is decided that if the expense of repairing a machine would *equal* its value the rule of avoidable consequences does not apply; the precise form in which the question was presented does not appear.

it is concerned with the very peculiar contract which this invention has brought in its train. The statute known in England as Lord Campbell's Act has produced the whole body of rules relating to death by wrongful act. This same process goes on in every branch of the law; but it is, perhaps, more noticeable in the law of Damages than in some others, because here very nearly the whole process of evolution has been compressed within what is for the law a very brief period.

Within this same period the effect of another and different process must be noticed. The abolition of the common-law forms of action, and the simplification of procedure, have had the effect of brushing away a number of purely technical rules which formerly made the recovery depend in many cases upon questions of pleading; and the effect of this has been to make the measure of recovery conform more and more to the real nature and extent of the redress required. Consequently, while the general result has been to produce a very considerable number of rules, it has also been to throw into greater relief than before the general principles which underlie the whole subject and give life and meaning to the rules themselves.

Enough has been said to account for the steady growth of the law of damages. The effect of simplifying procedure has not been to arrest the increase of the volume of the law. This must continue as long as the system just described exists. But it has greatly diminished the technicality of the rules. Generally speaking, the measure of damages is no longer affected by the fact that the declaration is laid in debt or *assumpsit*, in trover or trespass. The rules, though they tend to increase in number, tend also, when viewed as a whole, to present a more and more rational and intelligible system.

The law of damages may be regarded as in part made

up of these rules, and as in part consisting simply of a discretion in the jury in some cases of tort to give such damages as they may see fit. While the whole domain of contract is governed by rules capable of being stated in more or less explicit terms, and the statement of which can therefore be *required* on the trial, the control of the court over the jury in tort is very much less, though the tendency of modern decisions is to extend this control in every direction, and consequently, to assimilate the measure of recovery in both great divisions, so far as a common measure is in the nature of things applicable. As will be explained, however, there are inherent differences between tort and contract, which will probably forever prevent their being entirely assimilated.

The rules, wherever they exist, being capable of statement in an exact form (for otherwise they could not be given to a jury), may be readily made into a code of damages, and such codes have been introduced in one or two jurisdictions in this country by statute. The effect of this codification in simplifying the law has not been marked, for wherever the rules have been well stated, they have been either taken bodily from the decisions, or else have been the result of that collation of authorities which is a regular part of the ordinary duty of the judiciary, and is usually, at the present day, done better by judges than by legislators. Nor does the enactment of a rule of damages in the form of a law bring to an end the formation of new rules from it by the courts; whether a rule once stated remains a part of the common law or becomes a statute, it must still be interpreted and applied in the light of new facts as they arise.

The summary given in the present volume is not intended as a suggestion for a code, but as a convenient form of exhibiting in a small compass the general scheme of this branch of the law, and the relation of its parts to

one another. The text is designed to explain the reasons which have led to the adoption of the rule in each case, and the illustrations taken from the reports are instances of the working of the rule in practice.

With regard to the order of arrangement adopted, it has not been found advisable to alter very much that usually followed by the writers of treatises on Damages. The law is only in part logical, and if, for the sake of system, we depart very far from the path of its actual growth, we are continually in danger of increasing rather than diminishing the difficulties which embarrass its study.

Part I. deals with principles and rules of a general character affecting the measure and proof of damages; Part II. deals with the rules governing in particular classes of actions. Here the order is in a measure controlled by the fact that it is not primarily questions of liability which are considered, but the nature and extent of injuries, and the rules for measuring the compensation awarded for them by law. Now, it will be found that so far as actual injury is concerned, an act always has different consequences according as it affects, or does not affect the *person*. In all cases of personal injury, for example, recovery may be had for pain, and loss of earning capacity. In cases involving property rights, no such question can usually arise. This line of division cannot be lost sight of. Neither can that between Tort and Contract.

On the whole, it has been deemed most conducive to a clear comprehension of the subject, to make the division between Tort and Contract the basis of classification, and under the first head to begin with injuries to the person and personal rights, to pass on to cases where injury to property comes into view (*e.g.*, malicious prosecution), considering under the first head cases where the right infringed is personal, but the resulting injury is pecuniary

(*e.g.*, actions founded upon loss of service of a child, etc.). At the next step injuries to personal property and real estate are reached, where, in the absence of evil motive, the damages are capable of exact pecuniary measure.

Having now passed out of the range of tort, and entered upon that of contract, a region is arrived at where the measure of damages is, as far as may be, a matter of pecuniary calculation; and under this head contracts relating to person and personal property are first taken up, — Contracts of Service, Sales, Negotiable Paper, Indemnity, Insurance, Warranty, and Agency. To Contract also belong the rules governing Liquidated Damages.

This survey made, it appears that no place has been assigned to actions for breach of contracts relating to Real Estate, for breach of promise, for breach of telegraph contracts, nor to actions against carriers. These are all somewhat exceptional and are considered by themselves. In a treatise dealing only with general principles it has not been thought best to go into questions of practice and pleading, nor to discuss special statutes, the provisions of which are often local, and frequently introduce some principle at variance with those of the common law. Probably few of those at all conversant with the result will question that these legislative interferences with the ordinary principles of damages have been attended with results much to be regretted. Had a right of action been given in all cases, leaving the courts to determine the measure of recovery in accordance with the general principles of law, a vast amount of wasteful and unnecessary litigation, turning mainly upon the phraseology of the statutes, would have been avoided. So far, in fact, has this gone that a tendency to a reaction may now be seen, as in the extension in many States of the early remedy under the Eminent

Domain constitutional provisions and statutes to all cases of injury to property; and such constitutional changes as that recently introduced in New York, removing the pecuniary limit in actions for death.<sup>1</sup>

It may perhaps be worth while to point out that the study of Damages involves something of much greater importance than the acquisition of a number of technical rules of procedure. If the first question for the student is, Of what rights and duties does the Law consist? there is closely involved in it another, — What redress does it give for the violation of these rights and duties? To be equipped with a knowledge of every right of action would be of as little use to one unable to measure the value of his right as to one totally devoid of a knowledge of the nature and methods of judicial proof.

Historically, it is not too much to say that it is through damages that rights of action came into existence. Experience of wrong and injury is the efficient cause of all legal redress. The action on the case was brought into use because, with the development of society, the action of trespass was not found to cover the new cases of damage that were arising. The right of action for causing death was given by the legislature because of the loss to the widow and orphan which death caused by wrongful or negligent acts was seen to occasion. And so,

<sup>1</sup> While legislation is and always has been a natural means of introducing or declaring the existence of rights of action, any legislative predetermination of the measure of recovery must be, under the common-law system, productive of unnecessary litigation. The true measure of recovery cannot be exactly foreseen, because it depends upon the varying facts in each case, viewed in the light of general principles. These general principles are already known and need no legislative restatement. The chief effect of novel legislative rules of damages is to make each word employed in the statutes the subject of a protracted struggle of interpretation, resulting at last in an array of anomalous rules which only tend to embarrassment and perplexity.

recently, the right of privacy has been vindicated by the courts, not for its own sake, but because of a growing perception of the suffering caused by unauthorized intrusion into private life.

There is another fact which must not be overlooked, and that is, that in every ordinary common-law complaint the existence of the injury (the right of action), the right to compensation, and the amount of damage alleged to have been sustained are tried and decided in one proceeding.<sup>1</sup> It is for loss coupled either with the infringement of a right or the neglect of a duty that the law gives redress. But the infringement of a recognized legal right of itself imports damage, and entitles the possessor of the right to nominal damages, though there be no actual loss; while it is by no means true that all loss, though directly caused by another, is actionable. Consequently, in examining the field of Damages, the student is obliged to consider, first, cases of infringement of what are recognized as rights by the Common Law, even though no substantial injury be caused; second, cases of substantial loss occasioned either by infringement of legal right or by neglect of duty; third, cases where there is actual loss, but no legal injury is considered to arise. But the task once accomplished, the knowledge attained will be found to be a key, not merely to the subject of Damages, but to the body of the Law itself.

<sup>1</sup> East & West I. D. & B. J. Ry. Co. v. Gattke, 3 McN. & G. 155, 169.

## CHAPTER I.

### COMMON-LAW PRINCIPLES.

THE most fundamental general rule with regard to damages is that of Certainty. Damages must be certain, both in their nature and in respect to the cause from which they spring. It is more fundamental than any rule of compensation, because compensation is allowed or disallowed subject to it. It is a rule of proof, of paramount authority, and so limits the field of recovery that legal compensation can seldom be exactly coextensive with the actual injury suffered. Next to it in importance comes the rule of proximate cause. This is closely connected with the rule of certainty, and is a rule of necessity based upon the inherently limited nature of judicial investigation. In law there is no responsibility for effects so remotely and indirectly connected with a given act that we cannot, according to ordinary human experience, say with positiveness that one should occasion liability for the other. Both these rules restrict legal compensation within restricted limits. Whenever compensation is spoken of, what is meant is compensation subject to these rules.

The law, in establishing liability for civil injury, takes no notice of *motives*. In criminal law, where punishment is concerned, motive plays an important part. Civil law deals only with acts. If these acts *import* legal wrong, or if when causing actual loss they are actionable, a good motive will not make them less so. If not actionable, a bad motive will not make them so.<sup>1</sup>

<sup>1</sup> Cooley on Torts, \*p. 688, and *cas. cit.*

It may be said generally that so far as liability goes, the state of mind of the defendant is irrelevant to the question. Neither infancy nor insanity relieves him from responsibility.<sup>1</sup> So, a valid contract once made, liability for a breach arises simply from the fact of a breach by the act of the party.

The same is not true with regard to compensation. In the law of damages, whenever the act complained of is of such a character that the motive enhances the injury, some means are found of taking the motive into account. In contract, generally, the motive for the breach has no effect upon the damage, and so the law treats it as a matter of indifference. But if the contract is one of a purely personal character, the reason of the rule ceases, and hence in breach of promise, all the circumstances tending to show the character of the act may be inquired into. In tort some means is always found of bringing before the jury either the motive, or what comes to the same thing, the character of the wrong. This is the object accomplished by the doctrine of exemplary damages, wherever it prevails. That doctrine is that in cases of tort characterized by outrage, oppression, etc., the jury may, in addition to compensation, give something for the sake of punishment or example. In other jurisdictions the same end is accomplished by allowing compensation for the sense of wrong and injury that acts of this sort are calculated to produce. Exemplary damages are given in addition to strict compensation, on account of evil motive, where the facts show it;<sup>2</sup> compensation for a sense of wrong attains practically the same end, — that motive is not left out of the account. Circumstances “in mitigation or aggravation” are always admitted in evidence in tort; such circumstances are admitted partly for the express purpose of throwing light on

<sup>1</sup> *Williams v. Hays*, 143 N. Y. 442.

<sup>2</sup> 1 *Sedg. on Dam.* § 357, and *cas. in not.*

motive. The "sense of wrong and injury" caused by accidental loss innocently inflicted by a child can never be the same as that malevolently inflicted by an intentional wrong-doer.

As a general rule, the law takes no notice of benefits conferred. It is no answer to a complaint which establishes a legal injury, that the defendant has conferred an advantage on the plaintiff. A trespasser is still liable for his trespass, even though his trespass has resulted in the improvement of the property trespassed upon. When the damage is so involved with the benefit that the latter necessarily reduces the former, it is necessarily allowed for.<sup>1</sup>

In every variety of action the measure of damages may be laid down in an abstract form, and at the same time, in a particular case, this formula must be resolved into its elements, so as to state, specifically, the kinds of injury for which compensation is recoverable. The most general rule to be met with is that compensation must always be commensurate with injury.<sup>2</sup> Applied to cases of contract, the rule is stated to be that the plaintiff must be put in the same position, so far as money can do it, as he would have been had the contract been performed.<sup>3</sup> Still more specifically stated, the rule in contract becomes that the plaintiff recovers such damages as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach.<sup>4</sup> In a particular case, this rule may involve the loss of profits, of the benefit of a sub-contract, interest,

<sup>1</sup> *Jewett v. Whitney*, 43 Me. 242; *Murphy v. Fond du Lac*, 23 Wis. 365; *Forsyth v. Wells*, 41 Pa. St. 291.

<sup>2</sup> *Rockwood v. Allen*, 7 Mass. 254.

<sup>3</sup> *Griffin v. Colver*, 16 N. Y. 489.

<sup>4</sup> *Hadley v. Baxendale*, 9 Exch. 341.

etc. So in tort, the general rule is that the damages should be such a sum as will place the plaintiff in the same position as if the tort had not been committed. But here, again, to get at this sum, we must consider, in one case, the pain suffered, the amount of bills for nursing and medical attendance; in another, the value of the use of property taken away or destroyed; in a third, the sense of humiliation and disgrace.

The right of action being established, these elements of damage become part of the evidence in the plaintiff's case; the court must admit proof of them, and direct the jury to consider them in rendering their verdict. If they fail to do so, it will be ground for a new trial.

On the other hand, as has been already seen, notwithstanding these general rules, the law falls far short of giving compensation for the whole loss suffered, and consequently excludes in nearly every case many elements of damage which would have to be included if complete compensation were awarded. In all actions for the recovery of money only, for instance, damages for non-payment are limited to interest; in most actions, the expenses of litigation are excluded. These rules of exclusion will be presently considered.

The elements of damage which are admissible in evidence vary with the various kinds of action which may be brought, and elements admissible in one kind of action are inadmissible in another. To enumerate all the elements of damage admissible would plainly be impossible; fortunately, they will be found to fall generally under a comparatively limited number of heads or classes, according as the injury is one to person, property, or reputation, or involves the breach of a contract of sale, of carriage, of hire, or, again, arises from the breach of a real covenant.

All private injury or loss through the acts of others arises either from the invasion of some recognized legal right, as

a right of property, a right secured by contract, or a personal right, or from the neglect of some duty resulting in damage. By systematic analysis the substance of the law of damages may be resolved into rights, enforceable either against particular persons (rights founded upon contract), or against all the world (property rights, personal rights, etc.), or, again, into a system of duties; contractual duty being that of discharging an obligation voluntarily entered into by agreement with another, or implied in law; other duties being to refrain from doing something which, on the rival theory, would be regarded as the invasion of a right. Thus every one has a right, as against all the world, to his personal liberty; on the other hand, it is every one's duty to do nothing to abridge another's personal liberty.<sup>1</sup>

It is impossible in considering the law of damages to conceive of a duty without a correlative right, or of a right without a correlative duty. The civil law deals only with rights and duties between man and man. The matter may be made clearer by keeping constantly in mind the line of distinction between legal and all other relations. Reckless behavior, for instance, is always imprudent, and always immoral, but it is not in itself necessarily illegal. It is said to be immoral, among other reasons, because, though its consequences may in a given case seem to affect only the person guilty of the reckless act himself, some of its remoter consequences are almost certain to fall upon others. Thus the consequences of reckless expenditure fall, sooner or later, in the case of a married man, upon his family. Such recklessness is a violation, however, of a moral duty, and does not necessarily give those affected any correlative right enforceable by legal sanction. The

<sup>1</sup> Cf. Austin's "Jurisprudence," in which the analysis is founded on rights, with Bigelow's "Torts," in which the rights are transmuted into duties.

same is true of recklessness with regard to the property of others. A person may deal with another's property intrusted to him for safe keeping without any care for the consequences. If it escapes injury, the case does not come within the cognizance of the law. So far as the law is concerned, the matter is one of indifference. Thus far we are in a region of duties, but there are no correlative legal rights.

But if the recklessness results in injury to property or person, we at once find that we can express the attitude of the law toward the matter in terms, on the one side, of a right, on the other of a duty. It is every one's legal duty not to injure another through failing to observe the amount of care required by the circumstances. It is every one's right not to be so injured.

The same thing is true of the duty of truth, and this is in some respects a more striking illustration. It is a moral duty to be truthful, but no one can make us observe it. Indeed, it is not commonly insisted upon as an absolute duty. Not only are many petty social deceits matters of indifference, and many trifling suppressions of truth dictated by feelings of humanity, but falsehood for some purposes (as in the illustration commonly given of misdirecting a murderer in pursuit of his victim) is usually regarded as praiseworthy. But deceit which effects a fraud is a breach of a legal duty, and at once brings into view a legal right.

For practical purposes the law, following in this, as in so many other cases, the habits of ordinary speech and thought, treats a matter as one of right or of duty, according as the conception of right or duty is uppermost in the relation involved. When we think of property or ownership we conceive of it as a *nexus* of rights vested in the owner, not of duties imposed upon every one else to respect those rights; on the other hand, we always speak, and think, of the duty to exercise due care, or the duty to

be honest in mercantile dealings, as such, and not as a right to have every one refrain from such negligence as may cause damage; nor of a right that every one should not be deceitful to the point of detriment. This question of analysis is of some importance in connection with the rules relating to nominal damages.

It is necessary to explain at the outset the various sorts of Damage of which the law, on the one hand, takes cognizance, and which, on the other, it disregards.

*First.* There may be substantial damages without any legal injury or right to redress whatever. Every property owner, for instance, owns the space above his land to as great a height as he chooses to go. Consequently for damage caused to another by his use of this right the law gives no redress. It is *damnum absque injuria*. A landowner, for instance, wantonly and maliciously, and for the sole purpose of annoyance, erects a high fence on his own land, obstructing the lights of his neighbor. The lights are not ancient lights, nor has the neighbor acquired any right by grant or prescription. In such a case the law gives no redress.<sup>1</sup>

*Second.* There may be legal injury without any substantial damage. This is called *injuria sine damno*. It is not to be supposed that, because there is no substantial damage, there is no right of action. On the contrary, although the act may be a benefit, any legal infringement of a right imports damage, and entitles the plaintiff to a trifling sum called nominal damages, by way of redress, which may be regarded as compensation for the invasion of the right only. The judgment has also the effect of proving his right in any new controversy over the same matter, and for this reason it may be said that he *must* recover a verdict of some sort. For example, in a case of trespass on real estate, a verdict for the plaintiff is proof of

<sup>1</sup> Mahan v. Brown, 13 Wend. 261.

title. For breach of all contracts, all trespasses on real estate, all interferences with easements, and all cases of tort where no substantial loss can be shown, the plaintiff is still entitled to nominal damages.<sup>1</sup>

*Third.* Wherever actual damage is occasioned by legal injury, or the infringement of a right, the law gives substantial pecuniary redress. This embraces the whole field of contract and the great body of torts. Those cases of tort, such as negligence, where there is no right of action without damage, form an exception.

*Fourth.* Damage may be occasioned by the neglect (by way of act or omission) of a duty which in the absence of ensuing loss would be in law a matter of indifference. Such are all cases of negligence and deception followed by loss.<sup>2</sup>

*Fifth.* An anomalous class of cases exists where from reasons of public policy damage alone will give a right of action though there has been no breach of duty. Common carriers are, with certain exceptions, insurers against loss; the owner of cattle escaping from his

<sup>1</sup> It is sometimes said that neither *damnum absque injuria*, nor *injuria sine damno* will give an action. "That no act characterized by these negations is actionable is, in the abstract, a truism." 1 Sutherland on Damages, § 3. This is a mistake; it is only in the first case that the action fails. "I am not able to understand how it can be correctly said, in a legal sense, . . . that *injuria sine damno* is not actionable. . . . Actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right." — STORY, J., in *Webb v. Portland Mfg. Co.*, 3 Sumner, 189, 192.

<sup>2</sup> There are undoubtedly cases of deception followed by loss where no right of action is given, as in the ordinary case of misrepresentations in sales; but here the reason seems to be that the person who makes the representation is under no obligation to disclose the true facts; or because the buyer had brought it upon himself by not making enquiries. The damage was *caused* not by the defendant but by the plaintiff himself. Cooley on Torts, \*476.

control, is responsible for the consequences, though he has exercised due care. In England this rule has been extended to the case of inanimate substances (*e. g.*, water) brought on to one's premises.<sup>1</sup> In all the foregoing cases except the first, the law awards pecuniary compensation, and it remains to consider on what basis the rules governing this compensation rest.

The fundamental rule, as already stated, is that the remedy shall be commensurate with the injury sustained, so that, in cases of contract, the plaintiff shall receive a sum of money sufficient to place him in the same position as if the contract had been performed, in cases of tort in the same position as if it had not been committed.<sup>2</sup>

The injury must be such as comes from the cause of action complained of, and none other. The amount of damages is determined by rules of law which neither court nor jury are at liberty to disregard.<sup>3</sup>

While all awards of damages must be pecuniary, the elements of injury from proof of which the award is arrived at are of infinite variety. They may be purely pecuniary, as in the case of an action brought for breach of a contract to pay money; they may have primarily nothing to do with money, as in the case of many suits for defamation. The pain suffered as the consequence of a railroad accident, the mental distress arising from the non-delivery of a telegram, are not in their nature pecuniary injuries; the measure of the loss inflicted by them, however, must be pecuniary.

To understand the rules governing the measure of recovery, another important principle must not be lost sight

<sup>1</sup> *Fletcher v. Rylands*, L. R. 1 Ex. 265.

<sup>2</sup> *Rockwood v. Allen*, 7 Mass. 254; *U. S. v. Smith*, 94 U. S. 214; *Baker v. Drake*, 53 N. Y. 211; *Hobbes v. London & S. W. Ry. Co.*, L. R. 10 Q. B. 111. When the damages are nominal, they are still commensurate with the injury.

<sup>3</sup> *Walker v. Smith*, 1 Wash. C. C. 152.

of. All injury will be found to fall under two great heads, —gain prevented, or damage suffered. The principle, pervading the whole subject, that no damages can be recovered which cannot be established with certainty has been already noticed. But damages of one sort may often be established with certainty, while damages of another are incapable of proof. In such case, one means of ascertaining the damages failing, we resort to another, and thus there sometimes seem to be different rules of damages for the same species of injury. "Cases not unfrequently occur in which . . . it is certain that some loss has been sustained, or damage incurred, and that such loss or damage is the direct, immediate, and natural consequence of the breach of contract, but where the amount of the damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts that mode of estimating the damages which is most definite and certain."<sup>1</sup> For the breach of a contract, for instance, in one case the profits which would have been earned may be given; in another they are ruled out, and the plaintiff recovers the value of his time.<sup>2</sup>

In the same way, on similar states of facts, rent will be given in one case, and interest on the money value of an article in another. The following are some of the alternative measures of recovery: 1. Loss suffered. 2. Gain prevented. 3. The value of the use of the thing. 4. Interest. 5. Difference between actual and contract value. 6. Value of a bargain, less such expense as plaintiff must incur to obtain it.<sup>3</sup>

<sup>1</sup> *Per SELDEN, J.*, in *Griffin v. Colver*, 16 N. Y. 489, 495.

<sup>2</sup> *Howe S. M. Co. v. Bryson*, 44 Ia. 159, 163. In another case the value of the plaintiff's time may be ruled out, and rent or the hire of a chattel of which he has been deprived, be awarded him.

<sup>3</sup> *Passinger v. Thorburn*, 34 N. Y. 634.

In case of sale with warranty there is a regular rule — the difference between the thing as it is, and as it would have been had the warranty been true. But owing to the circumstances this rule may not be applicable, and then some other must be selected. So, the breach of contract being refusal to furnish an article to be employed in manufacture, which cannot be procured in the market, and the vendee having to procure an inferior article, the measure of damages is not the difference between the contract and market price (for the latter cannot be shown), but it is either the loss from having to use an inferior article, or from not receiving an advance upon a sub-contract made in the ordinary course of business.<sup>1</sup> Where an article had been destroyed by the act complained of, the question often arises whether in addition to its value, other damages may be recovered representing gains which would have come from its use. If these gains were within the contemplation of the parties and can be certainly proved, there is no reason why they should not be allowed. Otherwise the alternative rule of allowing interest on the value comes into play, this interest being now the best measure attainable of the value of the use.<sup>2</sup>

But for the power of the law to select an alternative rule of damages in this way, there would often be a failure of justice.

<sup>1</sup> *McHose v. Fulmer*, 73 Pa. St. 365.

<sup>2</sup> *Thomas B. & W. Mfg. Co. v. Wabash St. L. & P. Ry. Co.*, 62 Wis. 642.

## CHAPTER II.

### CERTAINTY.

THE rule of Certainty pervades the entire field of tort and contract. It is not peculiar to the law of damages, but is a universal rule of evidence, which, stated as a general principle, seems little more than a truism. It derives its great importance in our system from the fact of the control exercised by the court over the jury with reference to proof.

As already stated, any fact which either party desires to establish in a court of common law is proved by evidence submitted to the jury, but only by permission of the court, under the rules governing the admissibility of evidence; and every decision of the court admitting or rejecting proof offered is subject to review on exceptions taken during the trial. In the same way, all the instructions given by the court to the jury as to the force and effect of the evidence admitted are subject to exception, and the verdict as a whole is, on appeal, examined in the light of the evidence, to see whether it can be sustained. To warrant the affirmance of a verdict, it must obviously be based, not on speculation or hypothesis, but on proof certain in its nature, and, even to warrant the admission of evidence, it must be clearly evidence of matters of fact. And so, when the damages recoverable for a wrong or breach of contract are to be established, the nature and origin of the injury must be proved with such reasonable certainty as the nature of the case admits. Damages "must be certain, both in their nature and in respect to the cause from which they proceed."<sup>1</sup>

<sup>1</sup> *Griffin v. Colver*, 16 N. Y. 489, 495 (*per SELDEN, J.*).

Most of the illustrations of the rule arise in actions for breach of contract, turning on the question of gains prevented, or profits; in cases of tort affecting the person, where the injury is in whole or in part non-pecuniary, and where the jury has a discretionary control, the rule is of less importance, because the extent of non-pecuniary injury is always more or less uncertain; but where the injury is one to property, or pecuniary rights only, the rule of certainty applies exactly as in contract.

When it is said that the rule in the cases of non-pecuniary injuries is of less importance, it is only meant that from the nature of the case pecuniary standards of certainty, market values, etc., cannot be applied. But the evidence given must be of facts, and not of conjecture.

In some cases it happens that the claim of expected profits as the measure of damages is denied as uncertain; but at the same time evidence of past profits is admitted as having a tendency to show the value of the use of the thing of which the plaintiff has been deprived.

#### RULES.

1. *Damages must be certain, both in their nature and in respect to the cause from which they proceed.*
2. *Hypothetical or speculative damages are not recoverable.*

#### ILLUSTRATIONS.

(a) A contractor agrees to furnish marble from K. & M.'s quarry to erect a building for a stipulated price. The marble is delivered for some time, when the contract is broken by a refusal to receive any more. The profits which would have been made are recoverable.<sup>1</sup>

<sup>1</sup> *Masterton v. The Mayor*, 7 Hill, 61.

(b) D. makes a contract to go as master on a whaling voyage for a certain percentage of the profits. Being wrongfully dismissed, he can recover his share of the earnings, both before and after his removal.<sup>1</sup>

(c) One partner sues another for breach of the copartnership articles in dissolving before the time fixed. The damages are the profits which he would have made, and as bearing on this question, evidence of the past profits of the business is admissible.<sup>2</sup>

(d) A tenant is wrongfully ejected by his landlord from premises where he was established as a jeweller; he is entitled to recover for loss of profits.<sup>3</sup>

(e) A landlord, by cutting off steam power, destroys his tenant's business. He is responsible in damages for loss of profits. Evidence of the extent of the business and profits previously made is admissible.<sup>4</sup>

(f) In an action for personal injuries, a book canvasser, receiving for his services a certain percentage on sales, is permitted to testify to the amount of his annual sales, for several years prior to the injury. The evidence is admissible.<sup>5</sup>

(g) H. sues C. for overflowing his land and preventing its cultivation. His measure of damages is the fair rental value of the land, and not the value of crops which might possibly have been made, less the cost of producing and marketing them.<sup>6</sup>

(h) Seed sold is warranted good, but does not produce a crop. The expected profits are entirely speculative, and the measure of damages is the cost of the seed, the value of the labor in preparing the ground, less any benefit to the land resulting from such labor, together with interest.<sup>7</sup>

<sup>1</sup> *Dennis v. Maxfield*, 10 Allen, 138.

<sup>2</sup> *Bagley v. Smith*, 10 N. Y. 489.

<sup>3</sup> *Allison v. Chandler*, 11 Mich. 542.

<sup>4</sup> *Chapman v. Kirby*, 49 Ill. 211.

<sup>5</sup> *Ehrgott v. The Mayor*, 96 N. Y. 264. So of the past earnings of professional men, or any one living by his labor. Sedg. on Dam. § 180 no. c. To get at the value of the plaintiff's time, through his past earning capacity as shown by actual earnings, is usually the natural method of proof.

<sup>6</sup> *City of Chicago v. Huenerbein*, 85 Ill. 594.

<sup>7</sup> *Ferris v. Comstock*, 33 Conn. 513.

(i) In a similar case the seed is of inferior quality, and produces an inferior crop. The uncertainty of the quantity of the crop, dependent upon the weather and season, is removed, and the measure of damages is the difference between the value of the crop raised and the value of the crop as it should have been.<sup>1</sup>

(j) The cause of action is breach of a contract with B. to furnish him a hall for performances of a theatrical company, B to receive half the gross receipts. The measure of recovery is not conjectured profits, but the expenses of preparation for performance.<sup>2</sup>

(k) A telegraph company negligently delays the transmission of a message directing the purchase of property. In consequence of the delay no purchase is made by the person to whom it is addressed, and the price advancing, he does not purchase at all. There is no proof that the sender gave the order in expectation of profits on an immediate resale; nor that he could have resold at any subsequent time. He cannot recover for lost profits, and his measure of damages is the cost of transmitting the message.<sup>3</sup>

(l) In an action for the price of an engine, the defendant claims to reduce the damages by showing non-delivery at the time agreed. The engine was to have been used in a mill, and the vendee through the delay loses the use of certain machinery. The measure of damages is not the possible profits, but the fair value of the use during the period of delay.<sup>4</sup>

(m) In an action for the price of a steamboat, the vendee claims the right to deduct from the contract price loss of profit on trips that might have been made but for defects of construction. Such damages are not recoverable.<sup>5</sup>

(n) The cause of action is breach of contract for non-payment of money. Profits which might have been made by employing the money are speculative, and cannot be recovered.<sup>6</sup>

(o) In-action for personal injuries, no evidence of the value

<sup>1</sup> Wolcott v. Mount, 36 N. J. L. 262.

<sup>2</sup> Bernstein v. Meech, 130 N. Y. 354.

<sup>3</sup> W. U. Tel. Co. v. Hall, 124 U. S. 444.

<sup>4</sup> Griffin v. Colver, 16 N. Y. 489.

<sup>5</sup> Blanchard v. Ely, 21 Wend. 342.

<sup>6</sup> Greene v. Goddard, 9 Met. 212.

of the time lost by the person injured is given, nor are any facts proved from which its value can be estimated. The court charges that, if entitled to a verdict, he is entitled to "compensation for the time lost." On exception to this portion of the charge, the judgment is reversed, and a new trial ordered.<sup>1</sup>

(p) The action is to recover for personal injuries. Plaintiff had been engaged in the tea-importing and jobbing business. The profits, resulting partly from the services of his partner, are uncertain. Evidence of past profits is inadmissible.<sup>2</sup>

(q) M., a fisherman, sues W. for injury to a fishing-net. It would have required ten days to restore the net, but this was not done. The plaintiff can recover the cost of repairing and resetting the net, and the value of its use for the ten days, but not such prospective profits as might have been made during that period.<sup>3</sup>

(r) In an action for personal injuries by a railway coupler and switchman, receiving \$1.50 per day, he is asked, as a witness, as to his prospects of promotion to better paid employment. He testifies that he thinks he would have been promoted; that there is "a system" by which "if a man falls out you stand a chance of taking his place," and that yard-conductors obtain a salary from \$60 to \$75 per month. The evidence of the chance of promotion is inadmissible, as being too uncertain to be submitted to the jury in connection with the wages of employees in the superior employment.<sup>4</sup>

(s) U. and others are prevented by the act of the defendant from using their coal lands for a year. The measure of damages is not the possible profits, but the value of the use. Evidence is, however, admissible for the purpose of showing the value of the use of the rights taken, of the quality and quantity of the coal, the expense of mining, the nature and extent of the facilities for transportation to market, the extent of the demand, the cost of placing the coal on the market, and its mar-

<sup>1</sup> Leeds v. Met. Gas Light Co., 90 N. Y. 26.

<sup>2</sup> Masterton v. Mt. Vernon, 58 N. Y. 391.

<sup>3</sup> Wright v. Mulvaney, 78 Wis. 89.

<sup>4</sup> Richmond and Danville R. R. v. Elliott, 149 U. S. 266.

ket price. (All of these taken together would necessarily tend to show the possible profits.)<sup>1</sup>

(*t*) L. buys W.'s interest in a patented article, and agrees to put it on the market and pay W. \$5000 from the net profits. On breach of the contract, the plaintiff cannot recover profits "which might probably have been made;" but if no profits are proved, only nominal damages.<sup>2</sup>

<sup>1</sup> Newark Coal Co. v. Upson, 40 Oh. St. 17.

<sup>2</sup> Winslow v. Lane, 63 Me. 161.

## CHAPTER III.

### RULES OF EXCLUSION.

THE whole law of damages may be stated in the form of a single proposition: compensation must always be commensurate with injury. Before examining the subordinate rules into which this very general formula resolves itself when applied in practice to particular cases, it is necessary to notice certain rules of exclusion which, together with that of Certainty, reduce the field of actual compensation within much narrower limits than might perhaps have been anticipated. Some of these rules are frequently criticised as illustrations of the arbitrary and imperfect character of the law, and as if they might conceivably have been omitted altogether. It is believed, however, that they rest upon a foundation of principle, and cannot be disregarded without impairing two essential requirements, — certainty of proof, and uniformity of law.

1. As to the first and most constantly recurring of these rules of Exclusion, there is fortunately no dispute. The damages must be commensurate with the injury, but only so far as the injury proceeds from the cause complained of. This subject will be examined more fully elsewhere. Here it is only necessary to call attention to the fact that the rule is founded upon common experience of the relation between cause and effect. In an action for trespass, no one at the present day would be permitted to show that the trespasser was a witch, and had by means of a spell injured his cattle. Such is not a conceivable result of a trespass. In an action for a simple assault, evidence

that the person assaulted had suffered in his reputation for honesty would be irrelevant.<sup>1</sup>

In the same way, though the plaintiff may be able to show a clear case of injury, yet if he voluntarily enhances it, the enhanced damage is not due to the cause of action, but to his own act. The law expects that every one who is injured by another will use ordinary prudence to make the consequences as light as possible. A person injured in a railway collision may have a right of action, but if by refusing to employ a surgeon, he makes a slight injury so much more serious than it would otherwise have been that he dies, his death is to be laid at his own door, not at that of the railway company.<sup>2</sup>

2. The next principle to be noticed is that no recovery can be had for remote damages, that is, for such damages as are connected with the cause of action, but not so closely that responsibility can legally attach to him who is to be made answerable. The law cannot trace, because the human mind cannot trace, the operation of any given cause beyond a certain distance; every cause in operation at a given time produces effects, which in their turn are the causes of other effects, and it very soon becomes

<sup>1</sup> For a case in point see *Hutchinson v. Snider*, 137 Pa. St. 1.

<sup>2</sup> This is called the rule of avoidable consequences. See ch. vi. An analogous rule limiting the right of action itself is that of contributory negligence. Precisely as no damage can be recovered which does not flow from the cause of action complained of, so if there has been negligence on the defendant's part, yet if the negligence on the plaintiff's part contributed to produce *the cause of action*, there is no recovery, because there are no means of proving with certainty whether the plaintiff's negligence was an essential part of the cause or not. The rule of contributory negligence, however, which restricts recovery to the injury so far as it proceeds from the cause of action differs from that just noticed in being purely technical. Under other systems than that of the common law, as in Admiralty, in case of mutual fault the loss is apportioned. It is merely mentioned here because it is apt to be mistaken for a rule of damages.

impossible for the mind to determine that any given effect which it perceives is the result of the cause of action, any more than of some secondary cause. If A. fells B. to the earth, and B.'s skull is fractured, the chain of cause and effect is plain enough. But in most cases the matter is not so simple. Sparks from an engine set dry grass on fire, and the fire is communicated to a distant hay-rick which is close by a dwelling. The fire spreads from the hay-rick to the dwelling, which burns to the ground. Here it may be a nice question whether the *causa causans* of the injury is the sparks from the locomotive, or negligence in placing the hay-rick too near the dwelling.

Where a human act or omission has set in motion a train of consequences, the intervention of an independent will may produce a result entirely unexpected. Such a result is regarded as a remote consequence of the original cause. A seaman is engaged fraudulently to go to Peru on a vessel which proves to be a privateer. In a Peruvian port he goes ashore to consult the authorities, and is arrested and imprisoned as a deserter from the Peruvian army. This consequence is too remote for compensation.<sup>1</sup>

3. In all ordinary actions of Contract, only pecuniary elements of injury are considered. Pain of mind and anxiety are excluded. The reasons for this rule are probably three-fold. *First*, the evidence of the suffering, must, in the nature of the case, come wholly from the person injured, and may be grossly exaggerated or even invented for the occasion. *Second*, different people suffer anxiety arising from such causes in different degrees, and there is no common measure of the suffering. *Third*, in general, as a matter of fact, the natural and probable consequence of a breach of contract is the loss of money or money's worth.

Almost all contracts are of this description. But con-

<sup>1</sup> *Burton v. Pinkerton*, L. R. 2 Ex. 340.

tracts are made of which the value does not lie wholly, or even at all, in pecuniary advantage. Such is a promise of marriage, and such is also a contract for the delivery of telegraphic messages relating to family affairs, and interests non-pecuniary. In the former case universally, and in the latter, in some jurisdictions, the rule ceases to govern, the natural consequence of the breach being non-pecuniary.

4. It is an invariable rule in all actions for the recovery of money only, that the plaintiff recovers beyond the amount of the debt merely the interest on the money while withheld.<sup>1</sup> It may be that the failure to receive the money has involved him not only in other losses, but in absolute ruin. He is nevertheless restricted to interest, or the value of the use of the money while he is kept out of it. To one unfamiliar with the difficulties of proof which limit all attempts at perfect compensation, this must seem a harsh rule, but its foundation probably rests upon the fact that the causal connection between the non-payment of the money and the other losses is never capable of exact proof.

The general rule is that damages in contract must be such as flow naturally from the breach, or such as may be supposed to have been in the contemplation of the parties as the result of the breach. But what damages do flow naturally from the failure to pay money? It cannot be said that, beyond the loss of interest, there is any normal rule on the subject, for it depends on the circumstances in each particular case of the person who is to receive the money. It may produce merely annoyance. If his credit is good he may be able to procure the money elsewhere at once, and lose nothing but the interest. Even without any mercantile credit whatever he may have property by pledging or mortgaging which he

<sup>1</sup> British Col. S. M. Co. v. Nettleship, L. R. 3 C. P. 499, 506.

may make himself whole. Whether he procures the money or not will depend very often upon his individual vigor and readiness. So that in general it is not possible to say that the breach has any certain result except the loss of interest, while it is difficult to imagine a case in which the defendant could possibly contemplate the precise consequences of the breach as probable. To take an extreme case, suppose the failure to pay is immediately followed by bankruptcy. Is this the result of the breach of contract, or chiefly of causes long antedating it? In a particular case the question cannot be answered without an examination into the affairs of the person injured, similar to that resorted to in case of proceedings supplementary to execution, but far more difficult, because the issue raised would not be merely whether the person was devoid of property, but whether his being destitute was the result of the failure to pay him a certain sum of money at a certain day, and whether the defendant had any reason to anticipate such a result. Stated in this way, the reason of the rule limiting the recovery to interest is sufficiently apparent.<sup>1</sup>

5. The rule of exclusion which often seems most severe is that the prevailing party in an action at law is allowed to recover nothing either for the expenses of the litigation, or for his loss of time while engaged in it.<sup>2</sup>

A common-law judgment in an action for damages gives to the successful party only his taxable costs. These consist of small fees, bearing roughly a certain relation to the length of the period covered by the litigation. They may have been originally intended as compensation for the

<sup>1</sup> See *Greene v. Goddard*, 9 Met. 212, in which the rule allowing nothing but interest is traced to the uncertainty which would attend any attempt to estimate the profits which might have been made from the employment of money. This is final as to gains prevented; and it seems to apply just as clearly to loss suffered.

<sup>2</sup> *Oelrichs v. Spain*, 15 Wall. 211, 230.

time wasted in the suit, but they answer no such purpose now. For the counsel fees paid, no compensation has ever been made.<sup>1</sup>

At first sight this rule may seem unjust, but there is much to be said on the other side. *First*, if the plaintiff, on recovering a verdict, could saddle his opponent with the money paid or due to counsel, it would clearly be necessary to allow the defendant the same right. But this would tend to encourage speculative litigation. Again, should either an unsuccessful action, or an unsuccessful defence entail this consequence? An unsuccessful suit, or defence is neither a breach of contract nor a tort. The plaintiff certainly has violated no rights of the defendant by suing him. On the contrary, he has exercised a right guaranteed to him by law. The verdict, it is true, may establish that the plaintiff has no cause of action; but in ninety-nine cases out of a hundred he supposes himself to have one, and his motive in suing is immaterial. Consequently, if the defendant has been obliged to engage counsel, it is at most the result of a mistaken view taken by the plaintiff of his own position. For, although a party is supposed to know the law, he is not by any means supposed to know all the facts in advance, — for many of these may be within the exclusive knowledge of his adversary. As a rule, the law allows the assertion of rights without regard to motive, and if it be contended that the plaintiff should pay the defendant's counsel fee because he instituted the suit without justifiable cause, this would make necessary the determination of the very issue which the law declares irrelevant, — *why* did the plaintiff bring the suit?

<sup>1</sup> The practice recognized in some jurisdictions, that the jury may, when exemplary damages are recoverable, take into account counsel fees is not really an exception. In such jurisdictions they are not allowed as part of the plaintiff's legal compensation, nor even as counsel fees.

But the right of the plaintiff to a counsel fee stands on no better footing. If the plaintiff has an untrammelled right to sue, the defendant has an equally perfect right to defend. In actions of contract a positive rule of law precludes all inquiry into motive; in actions of tort, when evil motive is proved, the jury, as a rule, have the right to give exemplary damages. To allow counsel fees in addition would be manifestly oppressive.

But the fundamental difficulty is the impossibility of determining to what extent and to what amount the counsel fees of one party are *caused* by the wrong or breach of contract committed by the other, and how far these expenses have been swollen by independent causes. It may be that the defendant would have settled without suit, if the opportunity had been afforded him, in which case the cause of the *litigation* can hardly be said to be the act of the defendant. It may be that counsel have through want of skill, recklessness, etc., made the expenses unnecessarily great; in this case so much of the expenses as came from this cause was certainly not due to the defendant.

That this is the true explanation is confirmed by the exceptional cases in which counsel fees are allowed, — not in the original suit, but where litigation has been directly occasioned by the wrong or breach of contract of the defendant. Thus, when a contract, made by A. to submit B.'s claims to arbitrators, is broken by him, and B. has retained counsel, and been at trouble and expense in preparing for the trial, such expenses may be recovered. But the principle that they must have been *caused* by defendant's wrong is not lost sight of, and hence they are only recoverable in so far as they were not available for the trial of the case before the ordinary tribunals.<sup>1</sup> And so in an action for breach of covenants of seizin or of war-

<sup>1</sup> Pond v. Harris, 113 Mass. 114.

ranty, the counsel fees in the eviction suit, if reasonably defended, are recoverable.<sup>1</sup> And, generally, whenever a party is called upon to defend a suit founded upon a wrong, for which he is held responsible in law, without misfeasance on his part, but because of the wrongful act of another against whom he has a remedy over, counsel fees are, if he has notified the other to appear and defend, the natural and reasonably necessary consequences of the wrong of the other.<sup>2</sup>

RULES.

3. *No recovery can be had for damages attributable to any cause other than the cause of action.*
4. *No recovery can be had for remote damages.*
5. *In actions for breach of a contract, the advantage to be derived from which is money or money's worth, the party entitled to such advantage can only recover for elements of injury pecuniary in character.*
6. *In actions for the recovery of money only, no damages are recoverable, beyond the principal sum, with interest.*
7. *In an original proceeding there can be no recovery for time or money spent in the litigation beyond costs.*

<sup>1</sup> Ryerson v. Chapman, 66 Me. 557.

<sup>2</sup> Westfield v. Mayo, 122 Mass. 100.

## CHAPTER IV.

### TORT AND CONTRACT.

Two conflicting tendencies are perceived to be at work in the law of damages, which, once understood, explain many apparent inconsistencies. One is a tendency to assimilate the rules governing in tort and contract; the other to separate them by a permanent line of division.

To account, first, for their historical separation, there is the reason already referred to, — that tort long antedates contract, and that originally the damage suffered from a tort was treated as a matter of fact, which the jury were to report to the court, like any other. To understand the change effected by the process of time, we must first imagine ourselves in a state of society in which there are no legal rules of damages at all, in which contracts can hardly be said to have any existence, and in which injuries to the person, and very simple forms of interference with property seems to have constituted the chief business of the courts.<sup>1</sup> In such a state of society civil injuries consist wholly of torts, that is, of overt acts infringing definite rights, and in the case of such acts, the neighbors of the parties are called in to tell the court what damage has been done. It is a matter peculiarly within their knowledge.

Gradually, with the progress of society, and the development of new relations in the business of life, contract comes into view, and this necessarily is a matter with which the jury has little to do. The agreement consists of a promise to do or refrain from doing something; it is

<sup>1</sup> Pollock and Maitland, 15.

either express, or implied by the law itself from the circumstances. In either case, the validity of the promise, its interpretation, the effect of its breach in giving a right to redress, and the extent of the redress are matters peculiarly fitted for the consideration of the court. Consequently at the foundation of our system we find the measure of damages in tort remitted to the jury absolutely, while the measure of damages in contract soon shows signs of being regarded as a question of law. ✓

The establishment of rigid forms of action and rules of pleading necessarily have the effect of strengthening this tendency. In *debt*, in *debt on bond*, or *assumpsit*, the measure of recovery does not depend on the facts of the transaction, but on the proper interpretation of the writ and the language employed by the pleader. The jury know nothing about it, and if they did, would be incompetent to decide the question. Meanwhile the function of the jury slowly changes. Instead of being called in to tell the court what the facts are, it gradually becomes itself a tribunal of fact, no longer reporting matters of its own knowledge, but deciding questions of fact submitted to it, in accordance with the testimony of witnesses produced by the parties, and under rules of law as to its admissibility laid down by the court. When this change is accomplished, however, we find the jury still in control of the damages in tort, not in the primitive way of reporting what damage has been done, but of ascertaining from the evidence what it is. It is now said that in actions of tort the jury have a "discretion" as to the *quantum* of damages; that is, that while both in tort and contract the rules of law are binding upon the jury, in tort the jury may (within certain limits) give such damages as they think proper.

If the process had stopped here, it might be supposed that this "discretion" was nothing more nor less than the

remains of the early arbitrary power of the jury in all cases, and that, as it had been eradicated in contract, so too it would in time disappear in tort.

Such, however, has not been the result. Although forms of action and rules of pleading have been swept away, and although even in some jurisdictions it has long been unnecessary in framing a cause of action to state whether the defendant is sued in tort or contract, the distinction is still recognized as of binding force wherever the common law exists.<sup>1</sup> It is a matter of the commonest occurrence for a judge on appeal in cases of tort to say, "These  
✓ are not the damages which I should have given, had I been on the jury, but the jury have decided the matter and I cannot interfere."

For this persistence in the control of the jury over tort and the development of a "discretion" not existing elsewhere, there must obviously be some reason growing out of a difference in the nature of tort and contract, and such, now that forms of action and special pleading have disappeared, can readily be seen to be the case. Now that most purely technical rules are gone, and the recovery corresponds with the right, what may be termed the natural division between tort and contract comes into view. This line is one growing out of the nature of the injury inflicted by the act or omission complained of.

All substantial injuries may be broadly divided into such as are naturally estimated by a pecuniary standard, and such as are not. The former embrace all ordinary cases of contract, and all injuries to property, where there are no circumstances of aggravation growing out of the *character* of the act. A trespasser, for instance, upon

<sup>1</sup> In Massachusetts the declaration must state whether the action sounds in tort or contract. In New York this is not required. Nevertheless, the relation of court and jury as to damages in tort and contract respectively in the two States is the same.

land, breaks down a fence. The damages are the cost of repairing the fence; the repairs once paid for, the land owner is no worse for the trespass. But suppose that the trespass involves insulting conduct, and an assault and battery resulting in an illness; not only has there been pecuniary damage, measured by the cost of repairs, and medical expenses, but injury to the feelings, violence to the person, and physical pain. Now for these last three the *law* can furnish no rule of recovery. It is obviously a matter of good sense and discretion to determine how much non-pecuniary damage there has been, and how much money shall be paid for it. Once decided, unless the discrepancy between the damages allowed and the facts as to the injury proved is very glaring, it is impossible for any tribunal of review to say that it is wrong.

Bearing this, and the early history of the subject in mind, we should expect to find that with the disappearance of the strict rules of pleading and the forms of action, the discretion of the jury would be confined to cases of injury which are not naturally measured in money, and that all others would be governed by fixed rules. If this is not substantially the law to-day, it is certainly towards this goal that the law is in every direction tending, and it is the goal which it has in many cases reached. In other words, in all cases of injury naturally measured in money, whether arising from breach of contract, or invasion of property rights, there is a growing assimilation of the rules in tort and contract. In all other cases the line of division between the two exists, and must, so long as our present judicial machinery is preserved, continue to exist.

It will be noticed that all cases purely personal, *e. g.*, assault and battery, fall within the control of the jury; and not only this, but that wherever injury to property right is complicated with personal injury as coming from the

✓ same cause of action, the same result follows, for the two classes of injury cannot be separated. The control of the court appears whenever the case involves rights non-personal only.

It is unnecessary to discuss here in detail the principles upon which the "discretion" of the jury is exercised. In some jurisdictions, the damages which it gives for non-pecuniary injuries (*i. e.*, pain, mental suffering, &c.) are treated as strict compensation. That is, in theory, the sum of money awarded corresponds exactly with the injury inflicted, notwithstanding that the jury is spoken of as having a discretion as to the amount. In others they have the right to give in addition to compensation for such injuries in aggravated cases of wrong, — where the act is characterized by circumstances of insult, outrage, oppression or recklessness, — what are called "exemplary" damages, intended at once to redress the outrage and to punish the defendant. This doctrine shows the clearest traces of the jury's former comprehensive power.

One principle as to the discretion of the jury is universally established at the present day. It is no longer as it once was, arbitrary. In cases of damages for non-pecuniary injury, and even in those in which exemplary damages are allowable, it is restrained by another principle — that the verdict must neither be plainly inadequate nor plainly excessive. In such cases it is assumed by the court that it is the result either of prejudice, passion, or ignorance, and is not allowed to stand.

## CHAPTER V.

### CAUSE AND CONSEQUENCE.

THE rule of certainty separates hypothetical and speculative damages from those which are capable of the proof required by law, and precludes recovery for the former. Closely connected with it is the rule by means of which the responsibility for the consequences of acts is determined, — that of proximate cause.

‡ That considerable confusion exists on this subject is not to be denied. Judges have frequently recognized it with regret, and innumerable efforts have been made to place the matter upon a clear footing, which have not been altogether successful. The difficulty arises from its inherent complexity. The question of proximate cause involves not only the relation of cause and effect as it exists in nature, but this relation as it is affected by the principle of *legal liability* for consequences. It presents, moreover, at the outset, two distinct legal questions : *first*, is an observed effect so connected with a human agency that the latter must in law be held responsible for it? *second*, liability in law for an act being established, *how far* in the sequence of its effects is the burden of this liability to extend?

The view taken by the law of the relation of cause and effect in nature does not differ from that ordinarily acted upon in the affairs of life ; in fact it may be said to follow it closely. But the question which has to be answered in a court of law is partly one of cause and effect, partly one of proof, partly one of public policy, and partly one of the nature of the wrong complained of.

The following broad line of division distinguishes the cases. An injury has been suffered by A., and one of the contributing causes is alleged to be the act or omission of B. Is B. *liable*? There is no question here as to the proximateness or remoteness of particular *items* of damage. In all other cases the liability for some consequences is established, and the question now is, to what heads of damage does the liability extend?

It is in this second class of cases that the division of damages into direct, proximate, consequential, and remote becomes of importance.

The action is to recover damages to wool, delivered to a carrier for transportation from S. to A. The facts are that owing to the carrier's negligence, the wool arrived six days late at A., and while there was submerged by a sudden flood. The wool was intended to go to a further point, and but for the delay would have gone on and escaped the flood. The carrier is not liable. The flood is the proximate, the carrier's negligence the remote cause of the injury.<sup>1</sup>

An aeronaut ascends in a balloon and descends in plaintiff's garden. He is in a perilous situation, and calls for help. A crowd thereupon breaks through the fence into the garden, and beat and tread down the fruit and vegetables. The aeronaut is responsible not only for the damage done by the balloon, but for that done by the crowd.<sup>2</sup>

Here some liability for the trespass does not admit of dispute; the question to be settled was whether the law would go further and treat the damage done by the crowd as a consequence of the cause of action, entailing responsibility. In an action of slander, the words proved charge the plaintiff, a minor, about eighteen years old,

<sup>1</sup> Denny v. N. Y. C. R. R., 13 Gray, 481.

<sup>2</sup> Guille v. Swan, 19 Johns. 381.

living with her father, with vicious conduct. The complaint states that within a month of the slander, the plaintiff's father had promised her a silk dress, and a course of music lessons, and after having heard the charge, he refused to perform the promise. The evidence is that the father disbelieved the charge. The action cannot be sustained; such treatment of a daughter is not a proximate result of a slander which is disbelieved.<sup>1</sup>

So far as human acts are concerned, the fundamental assumptions of the law are: 1st, that the will is free; 2d, that every one is liable for the natural consequences of his acts. When it is said, however, that the law assumes the will to be free, no more is meant than that under ordinary circumstances, the individual is assumed to have a freedom of choice, and is consequently responsible for what he does. Experience shows that this principle does not always hold true; and that cases frequently arise in which the will is acted upon so powerfully by the will of others that it becomes irresponsible, and in such cases the law holds the third person as responsible who has produced the result, — not the intermediate person, through whose immediate acts the injury has arisen. In the so called Squib case<sup>2</sup> the defendant throws a lighted squib into a market house. It falls upon the stall of A. He to save himself throws it upon the stall of B. B. also throws it away, and it strikes the plaintiff and puts out his eye. The defendant is responsible. The action of the intermediate agents is regarded as involuntary.

But wherever the independent act of a third party intervenes, this interrupts the chain of causation. It is often a nice question whether such interruption has been caused or not. An action, for instance, is brought for injury

<sup>1</sup> Anon., 60 N. Y. 262.

<sup>2</sup> Scott v. Shepherd, 2 Wm. Bl. 892.

caused by an explosion of nitro-glycerine. The ground of liability relied upon is the storage of the nitro-glycerine by S. in a magazine on the defendants' lands, with their consent. The explosion takes place, not in the magazine, but at a distance from it, through the negligence of B., an incompetent servant of S., but still on defendant's lands. B. was, under S.'s orders, removing the nitro-glycerine, but not for a purpose connected in any way with the consent given to store it on defendant's lands. The cause is remote, and there is no liability.<sup>1</sup> On the other hand A., through B.'s fault, has received an injury, which without a surgical operation will cause his death. He employs a competent surgeon, through whose mistake the operation is not successful, and the patient dies. The proximate cause of his death is not the surgeon's error, but B.'s tort.<sup>2</sup>

In such cases the question of proximate cause is generally presented free from complication with the question *how far* the law will trace the consequences of an act; and the reason is that it is the damage itself as a whole which raises the question.

In all other cases, however, the matter is very different. The question of *liability* is determined at the outset by the existence or non-existence of a right of action. If in Contract, there has been a breach, if in an action for defamation there has been a libel, in a case of interference with real property rights there has been a trespass, a right of action exists which will at least entitle the plaintiff to nominal damages, and the remaining question is how far the law will trace the consequences of the defendant's act.

It is frequently said that it is impossible for the law to

<sup>1</sup> *Cuff v. N. & N. Y. R. R. Co.*, 35 N. J. L. 17.

<sup>2</sup> *Sauter v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 50.

compensate for all the effects of a wrongful act,<sup>1</sup> because the immediate results of any act are soon complicated by the intervention of new causes, themselves producing new effects, so that we cannot say that a given effect was, in the order of nature, produced by a given cause. But this is not the only reason. The effort of the law is to establish the principle of liability for consequences, and for this purpose it sometimes establishes certain rules, according to which it declares that where a certain connection of cause and effect exists there is liability, otherwise there is none; that liability for consequences being established by a wrongful act, certain damages shall be allowed, and certain others shall not. The rules of exclusion already considered shut out damages for reasons drawn from the law itself, not from nature.

It is, as has been just said, from the necessity of determining to what *heads of damage* compensation for liability decided by law to exist shall extend, that damages are classified as direct, consequential, proximate, and remote. Direct damages are those which are so closely connected with the wrong complained of that they may be said to be involved in the assertion of the right of action. In the case of personal injury, bodily injury and pain; in that of libel, damage to reputation; in that of conversion, loss of the thing converted; in that of trespass upon land, damage to the property; in that of the breach of a contract, the loss of the advantage which was the object of the contract,—are all direct.<sup>2</sup> Proximate damages (which include direct damages) are such as flow proximately from the cause of action, that is, are so connected

<sup>1</sup> *Fleming v. Beck*, 48 Pa. St. 309, 313; *Squire v. W. U. Tel. Co.*, 98 Mass. 232, 237.

<sup>2</sup> The definition here given cannot be said to rest upon authority; it is recommended by its convenience, and the fact that it follows the line of natural classification.

with it as results of it, that the law regards the person responsible for the cause of action as responsible also for them. Remote damages are all other results not so connected.

Consequential damages properly speaking are distinguished from direct, and are damages suffered in consequence of them. They are either proximate, in which case they are recoverable, or remote, in which case they are excluded. The term consequential damages is, however, perhaps most frequently used, as will be explained presently, to designate damages arising from consequences of a special kind, — those in contract.

In other words every cause of action may produce damages which are (a) direct, (b) consequential. Direct damages must be proximate and recoverable. Consequential damages may be proximate and consequently recoverable; they may be remote and excluded.

These are not the only terms used by the courts to discriminate consequences for which recovery may be had from those for which it may not be allowed. Damages are allowed, as being the "normal," "natural," "necessary," or "probable" results of a cause of action, and these epithets involve their opposites as qualifications of such damages as are not recoverable. The advantage of restricting ourselves to the terms direct, proximate, consequential, and remote, is that while these have abundant sanction in authority, they are exhaustive, and more definitely descriptive than any other. Consequential damages are often called "special" because in most cases, to be allowed they have to be claimed specially.<sup>1</sup> This, however, is a mere matter of pleading, and does not affect the relation of the injury to its cause.

<sup>1</sup> For example, in *Gibbs v. Cruikshank*, L. R. 8 C. P. 454, the same damages are referred to by BRETT, J., as "consequential," by KEATING, J., as "special;" both epithets are correct.

The question of liability being settled, the direct effect of the act complained of, *i. e.* either the immediate result, or such damages as are logically involved in the statement of the cause of action, is always subject for compensation.

#### RULE.

8. *Direct damages are always recoverable.*

#### ILLUSTRATIONS.

(a) A package sent by a carrier is lost. The carrier is responsible for the loss of the jewels contained in it, although he had no knowledge of the nature of the contents.<sup>1</sup>

(b) An assault and battery results in closing up the plaintiff's tear passage, thus injuring his eyes. This is a direct damage; the cause of action is personal injury.<sup>2</sup>

(c) An assault and battery renders the plaintiff subject to fits. This is a direct result.<sup>3</sup>

(d) The action is by a railway company for maliciously causing the arrest of its engineer, while engaged in running plaintiff's train. The damages claimed include the delay of the train. These damages are direct.<sup>4</sup>

(e) The action is for firing at a canoe of negroes about to board a ship off the African coast, the ship having gone there to trade, and this being also the object of the negroes in coming off. The damage claimed is the loss of the trade. This is direct.<sup>5</sup>

(f) The action is for breach of contract of sale by vendor. The plaintiff recovers the value of the article not delivered.<sup>6</sup>

<sup>1</sup> Little v. Boston & Me. R. R. Co., 66 Me. 239.

<sup>2</sup> Blake v. Lord, 16 Gray, 387.

<sup>3</sup> Sloan v. Edwards, 61 Md. 89.

<sup>4</sup> St. J. & Lake C. R. R. Co. v. Hunt, 55 Vt. 570.

<sup>5</sup> Tarleton v. McGawley, Peake N. P. 270. Lord KENTON does not call the damages direct, but as the question was, Were the defendants liable? and the interference with the trading was all that gave the right of action (the act of firing on the negroes being, as between the plaintiff and defendant otherwise entirely indifferent), the case seems a fair illustration of damages involved in the conception of the injury alleged as the cause of action.

<sup>6</sup> Marsh v. McPherson, 105 U. S. 709.

It will be found that wherever there exists a well-defined rule of law stating the measure of damages in a given kind of action (*e. g.* sales, negotiable instruments), what this rule states as the measure of damages are the direct, natural or usual damages involved in the conception of the particular loss in question, without regard to special circumstances.

In the great majority of cases there is no dispute about direct damages. The main difficulty is to determine how far responsibility extends for results which are in one sense indirect, being produced by the efficient cause of action in conjunction with other causes.

In such cases the question is, Are the *damages* proximate or remote; do they result proximately or remotely from the cause of action? And here the matter presents a different aspect according as the action is one of tort or contract. For although the sequence of cause and effect cannot be altered by the form of the action, there is an inherent difference between tort and contract, from the fact that in one the question is primarily of responsibility for an *act or omission*; in the other of compensation for the *value of a bargain or promise*. In the former the right to damages does not spring from an engagement entered into between the parties, but rests on a general rule that every one is responsible for the consequences of his acts; in the latter he is responsible simply for the breach of a promise to do or not to do some particular thing, and it is the value of this promise that he is answerable for. This difference explains many seeming inconsistencies in the cases.

The two questions — 1, that of liability; 2, that of the extent of the liability — will here be considered: first, as they present themselves in tort; second, in contract.

## TORT.

The first question in many, if not most, cases of tort, as has been already noticed, is whether the damage is so connected with the act complained of as to give rise to an action. This is true of all those cases of tort in which damage is the gist of the action; in them the damages are usually co-terminous with liability. Of these the principal division is cases of negligence; here, the want of care being proved, and also the damage to the plaintiff, the question is, Does the law consider the connection between the two to be so close as to make the defendant responsible? This, like many other legal questions, is in part a matter of observation and experience.

In actions of tort the condition of mind of the defendant is of no moment on the question of liability. Whether he foresees the results of his acts or not he is equally responsible for them. A. may knock B. down, and the result months afterwards may be paralysis or death. A city may leave a street out of repair, and an accident may happen entailing consequences equally serious, or, on the other hand, entirely trivial. As has been said in a New York case, nothing short of omniscience can make it possible to predict the consequences of a tort.<sup>1</sup>

It is sometimes said that the defendant's responsibility in tort extends only to results which might reasonably have been anticipated by him;<sup>2</sup> but this can only mean that all the consequences in the ordinary sequence of nature ought to be considered as within his contemplation,—humanly speaking, an impossibility. For the purpose of fixing liability no inquiry is permitted into what he did or did not anticipate.<sup>3</sup>

<sup>1</sup> *Ehrgott v. The Mayor*, 96 N. Y. 264, 281.

<sup>2</sup> *Morrison v. Davis*, 20 Pa. St. 171; *Gilman v. Noyes*, 57 N. H. 627.

<sup>3</sup> Cf. *Stevens v. Dudley*, 56 Vt. 158, with *Sharp v. Powell*, L. R.

It often happens that there is more than one proximate cause of the same effect, and here great difficulty sometimes arises. In a New York case,<sup>1</sup> speaking of highway accidents, the Court of Appeals has said: "When two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable, *provided the injury would not have been sustained but for such defect.*" And again: "When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened." The general rule may be laid down as follows:—

#### RULE.

9. *Legal responsibility in tort extends to any injurious consequence resulting by ordinary natural sequence, whether foreseen by the wrong-doer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued.*

#### ILLUSTRATIONS.

(a) A. while at a fair receives injuries by collision with a runaway team, the horses being driven by S. The facts are

7 C. P. 253, and *Clark v. Chambers*, 3 Q. B. D. 327; *Chicago & Alton R. R. Co. v. Pennell*, 110 Ill. 435. When it is said that an intervening flood or fire could not be reasonably anticipated no more is meant than that a flood or fire was out of the ordinary course of nature, and broke the regular or normal sequence of cause and effect. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304.

<sup>1</sup> *Ring v. Cohoes*, 77 N. Y. 83, 88, 90.

that the defendant, one of the fair officials, while clearing the track for a trial of speed, turns S. with his team off the track; in the act of turning S. is thrown out of his carriage, the horses break loose, run against A.'s carriage, and cause the injuries. The jury is charged in substance that the liability depends on whether the defendant had reasonable cause to expect or judge that his act would result in damage. On appeal a new trial is granted; the plaintiff's expectations or judgment have nothing to do with the matter.<sup>1</sup>

(b) Fire falls from the locomotive of an elevated road upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse becomes unmanageable, runs on to the sidewalk, and injures the plaintiff. The negligence of the railroad company is the proximate cause of the injury.<sup>2</sup>

(c) A., having had a quarrel with a boy, takes up a pickaxe and pursues him into B.'s store. To save himself the boy runs behind the counter, and in so doing knocks out the faucet from a cask of wine, and some of the contents is lost. B. can recover the value of the wine from A.<sup>3</sup>

(d) Owing to a defect in a street a traveller is thrown out of his carriage, dragged over the dashboard, has to procure another carriage, and is exposed for some time to the cold and rain. From the exposure he contracts a serious disease. The city is responsible for this consequence of the accident.<sup>4</sup>

(e) V. is under a duty to transport W. to California by way of the Isthmus of Panama, but fails to furnish transportation across the isthmus. After some delay W. is taken back to his starting-point, but meantime, owing to the unhealthy climate of the isthmus, has contracted an illness. V. is liable for loss of time and expense caused by the illness.<sup>5</sup>

(f) A., in occupation of certain premises abutting on a private road, erects a barrier at the entrance without right. Part of this barrier, consisting of a *chevaux de frise*, is removed from

<sup>1</sup> Stevens v. Dudley, 56 Vt. 158.

<sup>2</sup> Lowery v. Manhattan Ry. Co., 99 N. Y. 158.

<sup>3</sup> Vandenburg v. Truax, 4 Den. 465.

<sup>4</sup> Ehrgott v. The Mayor, 96 N. Y. 264.

<sup>5</sup> Williams v. Vanderbilt, 28 N. Y. 217. This case is one of contract against a carrier, but as to the point for which it is here cited, is not distinguishable from tort.

its position by a third person, and put in an upright position across the footpath. B. is lawfully proceeding at night along the footpath when he comes in contact with the *chevaux de frise*, and his eye is put out by one of the spikes. A. is responsible; the act of the third person in removing the unlawful obstruction was a natural result of the defendant's own act in placing it there.<sup>1</sup>

(g) A. negligently leaves his cart and horse unattended in the street. B., a child, gets upon the cart in play, while another child leads the horse on. B. is thrown down and hurt. A. is responsible; in a child such behavior is nothing more than natural.<sup>2</sup>

(h) A., a druggist, sells to B., also a dealer in drugs, a jar of extract of belladonna (a deadly poison) labelled "extract of dandelion" (a harmless medicine). B. sells the jar to C., a third dealer, and C. sells a portion on a physician's prescription of dandelion to D., who is poisoned. A. is liable to D.<sup>3</sup>

(i) By careless driving A.'s sled is caused to strike against the sleigh of B. with such violence as to break it to pieces, throwing B. out, frightening his horse, and causing the animal to escape from the control of his driver, and to run round a corner, where he causes damage to C. C. can recover for this against A.<sup>4</sup>

(j) In an action for assault and battery questions are proposed for submission to the jury founded on the theory that only such damages can be recovered as the defendant might reasonably be supposed to have contemplated as likely to result; the questions are excluded. The ruling is correct.<sup>5</sup>

(k) A. makes an unlawful sale of liquors to B., who through intoxication and consequent exposure dies. It is left to the jury to say whether intoxication was a natural and probable consequence of selling liquor in this case; if it was, then the will of B. is not an independent agency, and A. is responsible.<sup>6</sup>

<sup>1</sup> Clark v. Chambers, 3 Q. B. D. 327.

<sup>2</sup> Lynch v. Nurdin, 1 Ad. & El. (N. S.) 29. Had the plaintiff been an adult it would have been a clear case of contributory negligence.

<sup>3</sup> Thomas v. Winchester, 2 Seld. 397.

<sup>4</sup> McDonald v. Snelling, 14 All. 290.

<sup>5</sup> Vosburg v. Putney, 80 Wis. 523.

<sup>6</sup> Harrison v. Berkley, 1 Strob. 525.

(l) A., a director of musical performances, hires B., a singer. C. publishes a libel concerning B., and she refuses to sing. A. cannot recover the loss of receipts through her absence; her refusal to sing may have come as well from a number of other reasons.<sup>1</sup>

(m) In an action for assault and battery the plaintiff offers evidence to prove that by reason of it he lost a position to which he was about to be appointed. The evidence is not admissible; "one of the intervening causes of the loss of the office appears to have been a voluntary act of the plaintiff's own will, and there must also have been the concurrent voluntary acts of other men."<sup>2</sup>

(n) A local custom makes lawful the erection of "liberty poles" in the streets of a city. Such a pole is erected, and is subsequently broken by a wind of unusual violence, injuring plaintiff. The injury is not a proximate consequence of the erection of the pole.<sup>3</sup>

(o) A jury finds in substance that the burning of A.'s mill and lumber was the unavoidable consequences of the negligent burning of B.'s elevator. This in effect is finding that there is no intervening and independent cause between the negligent act and the injury.<sup>4</sup>

In *British Columbia Saw Mill Co. v. Nettleship*,<sup>5</sup> WILLES, J., mentions as contrary to common-sense a case said to have been decided "about two centuries and a half ago," in which a man going to be married to an heiress, and his horse having cast a shoe, employs a blacksmith to replace it. The horse is lamed by the blacksmith's want of skill, and the rider being delayed, the lady marries another. The blacksmith is held liable for the loss of the marriage. The proximate cause of the loss of the marriage is, of course, the lady's change of mind, not the laming of the horse. Nor is another marriage the proximate result of

<sup>1</sup> *Ashley v. Harrison*, 1 Esp. 48.

<sup>2</sup> *Brown v. Cummings*, 7 All. 507.

<sup>3</sup> *City of Allegheny v. Zimmerman*, 95 Pa. St. 287.

<sup>4</sup> *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

<sup>5</sup> L. R. 3 C. P. 499, 508.

a delay in the arrival of the bridegroom. Nor can it be said that but for the delay the marriage would have been secured.

It is sometimes said that in cases of wilful or malicious wrong the rule of remoteness is "relaxed;" but this is an entire mistake. The character of the wrong or condition of mind of the defendant does not affect the question of proximate cause. The difference is simply as to the measure of damages; for where the tort is malicious, exemplary damages may be recovered. This has nothing to do, however, with the fact of the wrong-doer's responsibility for consequences.<sup>1</sup>

#### RULE.

#### 10. *The question of proximate cause is for the jury.*<sup>2</sup>

#### ILLUSTRATIONS.

(a) Defendants negligently pile boards in a public highway, and a wagon loaded with barrels is driven over them, producing a noise which frightens plaintiff's horse. The horse, which is well-broken and carefully driven, starts and throws plaintiff out of his wagon, seriously injuring him. On these facts a non suit cannot be granted; it is for the jury to say whether the defendant's acts were the proximate cause of the injury.<sup>3</sup>

(b) The action is tort for deceit in the sale of a horse, induced by false representations that he is "perfectly safe" and not "afraid of the cars." The plaintiff claims damages for a personal injury suffered from an accident, caused through the horse running away from fear of cars. The jury is directed to return a verdict for the defendant. The plaintiff is entitled to a new trial; the question whether the fright or vice of the horse was the cause of the injury should have been submitted to the jury.<sup>4</sup>

<sup>1</sup> Ind., Peru, & C. Ry. Co. v. Pitzer, 109 Ind. 179.

<sup>2</sup> West Mahanoy v. Watson, 112 Pa. St. 574; Kreuziger v. Chicago, &c. R. Co., 73 Wisc. 158; Waterman v. Chicago & A. R. R. Co., 82 Wisc. 613; Chicago, &c. R. Co. v. Pennell, 110 Ill. 435.

<sup>3</sup> Lake v. Milliken, 62 Me. 240.

<sup>4</sup> Allen v. Truesdell, 135 Mass. 75.

(c) In an action to recover for loss by fire caused by sparks from a steamboat the court is requested to instruct the jury that if they believe the sparks set fire to the building through the negligence of the defendants, and the distance of the building was a given number of feet, then the injury was too remote to afford a ground for recovery. The court declines so to instruct the jury. This is right; because the whole question of proximate cause and negligence is for the jury.<sup>1</sup>

As in every other question of fact, however, if the court considers the evidence so clear that there is nothing for the jury to consider, it will decide the question itself. Hence questions closely resembling each other will be decided differently in different courts.<sup>2</sup> Most of the cases lie between two extremes. At one end of the line is a perfectly plain case for the court: for instance, a boy buys gunpowder, and it remains in the legal custody of his parents, or, in their absence, of his aunt, for some days. He then fires some off and is injured. The injury is not the proximate result of the sale, and on suit against the seller the jury must be instructed that there is no legal and sufficient evidence to authorize them to find a verdict for the plaintiff.<sup>3</sup> At the other extreme are cases such as those above cited.

It seems to be sometimes thought that the question of proximate cause ought always to be treated as one of law, and that the only question for the jury is to ascertain the facts necessary to the decision of the question by the court. The action is for carelessly leaving bars down, owing to which sheep escape and are devoured by bears. The plaintiff contends that the proximate cause is leaving the bars down; the defendant that the connection of cause and

<sup>1</sup> *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

<sup>2</sup> Cf. the case above, and cases therein cited, with *Ryan v. The N. Y. Central R. R. Co.*, 35 N. Y. 210, and *Pa. R. R. Co. v. Kerr*, 62 Pa. St. 353.

<sup>3</sup> *Carter v. Towne*, 103 Mass. 507.

effect is too remote. The trial court instructs the jury that if they find the following facts,— that the sheep escaped in consequence of the bars being down, and that they would not have been killed but for the act of the defendant, then he is liable, as a matter of law. On appeal, a new trial is granted, on the ground that the whole question of proximate cause should have been left to the jury, as a matter of fact.<sup>1</sup> One of the judges dissents on the ground that no undisputed fact is left unsettled by the findings of the jury, and that the liability of the defendant depends on a purely legal question whether, on the facts stated, the act of the defendant is considered in law the cause of the result. The difficulties surrounding the question of cause and effect in such a case, as a matter of fact in nature, are thus dwelt upon by the learned judge:—

“The jury say the sheep would not have been killed by bears but for their escape, and would not have escaped but for the bars being left down. But it is equally certain, without any finding of the jury, that they would not have been killed by bears if the bears had not been there to do the deed; and how many antecedent facts the presence of the bears may involve, each one of which bore a causative relation to the principal fact sufficiently intimate so that it may be said that the latter would not have occurred but for the occurrence of the former, no man can say. Suppose the bears had been chased by a hunter, at an indefinite time before, whereby a direction was given to their wanderings which brought them into the neighborhood at this particular time; suppose they were repulsed the night before in an attack upon the bee-hives of some farmer in a distant settlement, and to escape the stings of their vindictive pursuers, fled, with nothing but chance to direct their course, toward the spot where they met the sheep; suppose they were frightened that morning from

<sup>1</sup> *Gilman v. Noyes*, 57 N. H. 627.

their repast in a neighboring corn field, and so brought to the place of the fatal encounter just at that particular point of time. Obviously, the number of events in the history, not only of those individual bears, but of their progenitors, clear back to the pair that, in instinctive obedience to the Divine command, went in unto Noah in the ark, of which it may be said but for this the sheep would not have been killed, is simply without limit."<sup>1</sup>

In an action brought by a master for the seduction of his servant,<sup>2</sup> the gist of the action is the loss of service, and unless the seduction be the cause of the loss of service there can be no recovery. In most cases the seduction is followed by pregnancy, and sometimes by sexual disease.<sup>3</sup> Here there is no question. But a difficulty, which well illustrates the real nature of the question of proximate cause, sometimes arises in cases where it is alleged that the loss of service comes from mental distress caused by the seduction, and occasioning an incapacity to labor. Here, except in an extreme case, where there is no evidence to warrant a finding, the matter is one for the jury.<sup>4</sup> Thus, there is no pregnancy or sexual disease, but there is evidence of unusual mental distress and a bad condition of health. The jury are instructed that to permit recovery they must be satisfied that the failure of health was the immediate result of the act, and that there was a consequent loss of ability to render service. A verdict for the plaintiff is sustained.<sup>5</sup> On the other hand, where on all the evidence it appears that there was no loss of service for three months after the seduction, and the loss of health

<sup>1</sup> Per Ladd, J., diss., in *Gilman v. Noyes*, 57 N. H. 627.

<sup>2</sup> See Chap. XIII.

<sup>3</sup> *White v. Nellis*, 31 N. Y. 405.

<sup>4</sup> *Manvell v. Thomson*, 2 C. & P. 303; *Abrahams v. Kidney*, 104 Mass. 222; *Boyle v. Brandon*, 13 M. & W. 738; *Knight v. Wilcox*, 4 Kernan, 413; *Blagge v. Hsley*, 127 Mass. 191.

<sup>5</sup> *Blagge v. Hsley*, 127 Mass. 191.

appears to have come from fear of exposure through a threatened prosecution of defendant, no action will lie.<sup>1</sup>

In tort the term "consequential" damages is of little importance. They mean no more than such proximate damages as are not direct. Such damages are frequently allowed in replevin,<sup>2</sup> trespass,<sup>3</sup> and in all cases where the expense of avoiding the consequences of the defendant's act is allowed.<sup>4</sup>

Where the plaintiff sues to recover the value of property, as in trover, at the present day he usually receives interest as well. This, being given on account of the time during which the plaintiff has been deprived of the use of the property, may be said to represent consequential damages. Where he does not recover interest, there seems no reason why he should not recover the value of the use of the article, and so it has been held in England.<sup>5</sup> The article may have a special value, from the fact of its having been resold at an advance. In such a case it has been argued that notice ought to have been given in order to hold the defendant for any thing beyond the ordinary value; but this attempt at an inquiry into the state of the defendant's mind, has met with no success. The value of the article is a matter of fact, unaffected by the fact of notice.<sup>6</sup> Indeed such special value seems to present a case of direct damage.

#### CONTRACT.

The question of proximate cause generally arises in actions of tort, when it is a question for the jury, but it may arise also in actions of contract. In actions upon insurance policies, where the question of a breach depends

<sup>1</sup> *Knight v. Wilcox*, 4 Kern. 413.

<sup>2</sup> *Gibbs v. Cruikshank*, L. R. 8 C. P. 454.

<sup>3</sup> *Barnum v. Vandusen*, 16 Conn. 200.

<sup>4</sup> See chapter on Avoidable Consequences.

<sup>5</sup> *Bodley v. Reynolds*, 8 Ad. & El. 779.

<sup>6</sup> *France v. Gandet*, L. R., 6 Q. B. 199, 204.

on whether the *peril insured against* was the cause of the loss complained of, the question of proximate cause is one of the interpretation of the contract, and hence for the court. A fire occurs in the tower of a building used for generating electricity; it is not communicated to the rest of the building and is speedily extinguished. It causes, however, electrical disturbances, which result in damage to the machinery in another part of the building. This is a "loss or damage by fire" within the meaning of the policy.<sup>1</sup>

A cargo of 6,500 bags of coffee is insured on a voyage from South America to New York, against the perils of the sea, but there is a warranty in favor of the underwriters that they are "free from all consequences of hostilities" (a state of war existing at the time between the United States and the Southern Confederacy). On the voyage the master, being out of his reckoning, goes ashore south of Cape Hatteras. Until recently there had been a light there, but this had been taken away for the purpose of harassing Northern ships. The ship is boarded by officers, and the captain and crew detained as prisoners. Of the coffee 150 bags are saved by "salvors," officers appointed for the purpose; all the rest is lost; but it appears that 1000 bags of it might have been saved, but for the interference by Southern troops; on these facts the proximate cause of the loss is not the extinguishment of the light (an act of hostility) but a peril of the sea. As to 1000 bags which might have been saved, however, the proximate cause is not a peril of the sea, but was an act of hostility.<sup>2</sup>

But it may sometimes present a simple question of fact for the jury, as in tort.

The cause of action is breach of covenant in a lease to

<sup>1</sup> *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.*, 158 Mass. 570.

<sup>2</sup> *Ionides v. Universal M. Ins. Co.*, 14 C. B., N. S. 259.

permit the usual notice "to let" to be posted on the building. The damages claimed are ensuing loss of rent. It is a question for the jury whether there was a loss of rent *because* of the violation of the covenant. There may have been other causes.<sup>1</sup>

A carrier fails to deliver cotton for use in a mill, and damages are claimed for stoppage of the mill. The court cannot rule, as a matter of law, that the stoppage of the mill was caused by the breach. Neglect on the part of the owner to have cotton on hand may have been the true cause.<sup>2</sup>

Ordinarily, in cases of contract, the question is not one of liability for proximate cause, but of consequential damages. The breach of contract establishes liability, and the question of the allowance of any item of damage is practically one of the interpretation of the contract, and consequently for the court.<sup>3</sup>

This emphasizes once more the fundamental distinction between tort and contract. In tort, the question of the relation in fact between the cause of action and the result — one of ordinary natural sequence — is left to the decision of a jury; in contract, if this were done our existing rules governing the measure of damages would disappear. In the case last cited (a case of contract), Blackburn, J., says: "I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote."

In a recent English case<sup>4</sup> the defendants agreed to load a quantity of tiles on board a vessel of which they were

<sup>1</sup> U. S. Trust Co. v. O'Brien, 143 N. Y. 284.

<sup>2</sup> Gee v. L. and Y. Ry. Co., 6 H. & N. 211.

<sup>3</sup> Hobbs v. L. & S. W. Ry. Co., L. R., 10 Q. B. 111, 122; Hammond v. Bussey, 20 Q. B. D. 79, 89.

<sup>4</sup> Welch v. Anderson, 61 L. J. (N. S.) Q. B. 167.

charterers. There was a breach of the contract, and the plaintiff paid £42 to a railway company for demurrage. The only question in the case was whether this was the reasonable and normal result of the breach (a true question of law). The question was left to the jury, who found for the plaintiff. On appeal the verdict was sustained, and the Court of Appeal very significantly said that "the Lord Chief Justice might have ruled that this was an undefended action, and that the only question for the jury was the amount of damages." The defendants, of course, could not complain of a ruling too favorable to them; but it can hardly be that the question was one of law or fact at the option of the trial court.

Liability for a breach of contract being established, damages claimed may be excluded under the general rules of exclusion already stated,<sup>1</sup> or as so disconnected with the cause of action as practically not to be attributable to it,<sup>2</sup> or as so conjecturally connected with it as not to be capable of proof.<sup>3</sup> Damages included may fall under the head of direct, proximate, and consequential; the proximate being often called natural. The direct damages being involved in the very conception of the breach, — the money unpaid, the value of the property injured or taken, — all other proximate damages are such as by the ordinary operation of cause and effect are produced by the breach of such a contract.

In contract a special kind of consequential damages is allowed, — those "arising from the contemplation of the parties," to which the term is here usually restricted. These damages are necessarily proximate, that is, they are proximate results of the cause of action, for otherwise they would be excluded as remote; but they are only proximate under the special circumstances surrounding the contract; in the absence of these circumstances, the con-

<sup>1</sup> See Chap. III.

<sup>2</sup> See Rule 3.

<sup>3</sup> See Chap. II.

tract remaining precisely the same, they would be remote. In other words the same consequence of the breach of a contract will, in the absence of evidence bearing on what the parties contemplated, be remote; with such evidence, proximate. The case is a peculiar one.

In the leading case on the subject<sup>1</sup> the owners of a mill deliver to a carrier a broken shaft to be taken to an engineer as a model for a new one. On making the contract, the carrier's clerk is informed that the mill has stopped, and that the shaft must be sent immediately. The clerk promises that it shall be delivered at once, but there is an unreasonable delay, owing to which the mill cannot be worked. There being no proof that the carrier *knew* that the mill must be stopped until the new shaft was obtained, he is held not liable for the profits lost during the period of delay. The following is laid down as the general rule governing all cases of contract; although much criticised in some of its details, it still retains its position in the law as perhaps the best expression in the most authoritative form of the underlying principle with regard to the extent of recovery.

#### RULE.

11. *For breach of contract, the damages are such as may fairly and reasonably be considered, either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.*

<sup>1</sup> Hadley v. Baxendale, 9 Exch. 341.

## ILLUSTRATIONS.

(a) The action is contract against a carrier for having set plaintiff down at the wrong station, so that he is obliged to walk home. He can recover for the inconvenience of having to walk.<sup>1</sup>

(b) A. agrees with B. to have a ship ready at a certain date, in the dock to receive a cargo of tiles. The ship is not ready and the tiles are left in the trucks in which they came. B. has to pay the railway company owning the trucks a certain sum for this as demurrage. The ordinary course of business on the docks would have been to have the tiles brought up to the ship's side, and in that case the dock company's charges would have been lower than the railway's. B. being entitled to deliver in either way, the money paid for the detention of the truck, is the natural and ordinary result of the breach.<sup>2</sup>

(c) A common carrier loses a package intrusted to him for delivery, containing a set of plans for a house. He has no knowledge of the contents of the package, or of the use to which the plans were to be applied. The plans have no market value, and are useful only to the owner. The measure of damages is the cost of new plans and other expenses reasonably incurred in procuring them, but not damages for the delay; they were neither natural, nor within the contemplation of the parties.<sup>3</sup>

(d) A shipper makes a special contract with a railroad company to transport apples and deliver them to a connecting road within a certain time, in order to avoid the danger of freezing. The carrier negligently delays delivering, and the apples are frozen while on the connecting line. The risk having been anticipated and contemplated by the parties, the shipper can recover the whole amount of his loss.<sup>4</sup>

(e) Defendant agrees to supply plaintiff, a butcher, with ice, knowing the plaintiff's object to be to keep meat fresh, but fails to do so, in consequence of which a considerable amount of meat

<sup>1</sup> *Hobbs v. L. & S. W. Ry. Co.*, L. R., 10 Q. B. 111.

<sup>2</sup> *Welch v. Anderson*, 61 L. J. (N. S.) Q. B. 167.

<sup>3</sup> *Mather v. Am. Exp. Co.*, 138 Mass. 55.

<sup>4</sup> *Fox v. Boston & Me. R. R. Co.*, 148 Mass. 220.

is spoiled. The measure of damages includes the value of the meat spoiled.<sup>1</sup>

(f) A contract is made to deliver machinery for a cotton seed oil mill. The facts show that the time specified was regarded as essential, and that the purchase of cotton seed in advance, in order to manufacture it at the time fixed, was contemplated by the parties. In consequence of delay in furnishing the machinery, some of the seed so purchased deteriorates. The measure of damages includes this loss.<sup>2</sup>

This rule, as interpreted by the courts, consists of two branches: *First*, if there is nothing to serve as a guide but the contract itself, then, besides the direct damages, only such damages can be taken into the account as may be considered the natural (and proximate) consequences of the breach (for here also, as every where else, the rule of proximate cause operates to cut off *remote* damages). *Second*, if in addition to the contract there are certain special circumstances which may reasonably be taken as having been in the contemplation of the parties *at the time of making the contract*,<sup>3</sup> such damages as would be likely to result from the breach in the light of those special circumstances may be recovered in addition (again subject, however, to the rule of proximate cause).

The question how far the damages can be supposed to have been within the contemplation of the parties depends of course upon the condition of mind of both parties. The defendant must have some notice or knowledge of the special consequences reasonably to be anticipated from his breach. This notice or knowledge is entirely distinct from the contract itself, but it must form the basis of the

<sup>1</sup> *Hammer v. Schoenfelder*, 47 Wis. 455.

<sup>2</sup> *Van Winkle v. Wilkins*, 81 Ga. 93.

<sup>3</sup> Not that these damages were actually contemplated; for, as was said by Martin, B., in *Wilson v. Newport Dock Co.*, L. R. 1 Ex. 177, 185, parties usually contemplate the performance, not the breach of contracts.

contract. It is in substance proof that the parties at the time of making the contract had in mind certain special objects, which the contract of itself did not imply.

## ILLUSTRATIONS.

(a) A. contracts to supply B. with shirtings of a certain quality, A. being informed that they are intended for shipment. On breach, B., to fulfil the contract with his vendee (there being no other goods of the same kind in the market), has to buy elsewhere, at a higher price, goods which are better, but the nearest obtainable to those contracted for. His measure of damages is the difference between the contract price and what he was obliged to pay.<sup>1</sup>

(b) A. contracts with J., to make for him a "gunpowder pile-driver," to be delivered at a fixed date. B. knowing the circumstances agrees with A. to supply a part of the machine called a "gun." Owing to an unreasonable delay in completing the "gun," J. refuses to accept the machine. The machine is unsalable, and that it would be so B. knew at the outset. A. is entitled to recover damages from B. for the loss of profit on the contract with J. and for expenditure needlessly incurred on the machine.<sup>2</sup>

(c) A. agrees to sell B. a quantity of caustic soda, a commodity not ordinarily procurable in the market, knowing at the time that B. is buying the soda for a foreign correspondent, but nothing more. In fact B. has contracted to sell the soda to C. in St. Petersburg at an advance, while C. has contracted to sell it to D. at a further advance. A part of the soda only is delivered to B. after considerable delay, and he is obliged to pay a higher rate of freight and insurance. On account of the failure to deliver the remainder, B. is compelled to pay C. £159, which C. has been obliged to pay D. for breach of the third contract. B. is entitled to recover the excess of freight and insurance, and the loss of profit on the sale to C., but not the £159 paid on a sub-contract of which he had no notice.<sup>3</sup>

<sup>1</sup> *Hinde v. Liddell*, L. R. 10 Q. B. 265.

<sup>2</sup> *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670.

<sup>3</sup> *Borries v. Hutchinson*, 18 C. B. N. S. 445. The bearing of the fact

(d) A. agrees to furnish B. with a number of sets of wheels and axles made from tracings, and not procurable in the market generally. B. has a contract to supply the Russian government with wagons, under a penalty of two roubles a day for delay. A. is informed of this contract, but not of the date fixed for delivery, nor the amount of the penalty. By reason of A.'s delay, B. makes default, and settles with the Russian government, at one rouble a day, for £100. The proper measure of damages is not the sum paid in settlement as such, but "a fair compensation for the loss which would naturally arise from the delay," including the probable liability of B. to damages by reason of the breach of that contract to which, as both parties knew, the contract of A. was subsidiary.<sup>1</sup>

(e) Defendant, a merchant, agrees to furnish plaintiff, another merchant, with sheep-skins of a certain sort for which there is no market price, and not procurable anywhere unless ordered some time in advance. Defendant knows that plaintiff requires them to fulfil a contract in France with a third person, but does not know the price fixed in the subcontract. On breach of the first contract, the plaintiff is sued on the French contract, and has to pay £28 damages. On suit by him on his contract, he may recover not only the profit on the first contract, but also damages in respect of his liability on the French contract, and in estimating such damages the £28 assessed may be treated as reasonable.<sup>2</sup>

(f) A. contracts for the sale of a particular kind of coal to B., knowing that the latter was buying to sell again as of that description. B. resells to C., but the coal is of an inferior quality, and this fact could not be ascertained on inspection, but only on use by C. C. brings an action against B., of which B. gives notice to A. A., however, insists that the coal is according to contract. The verdict is that the coal is not according

that the article is not procurable in the market is twofold: *first*, the vendee cannot replace himself by going into the market; *second*, if there is a market price, it might be that the vendee only contemplated a sub-contract at that price, as in the case of a *special use* contemplated by the vendee, and an ordinary one by the vendor.

<sup>1</sup> Elbinger Actien-Gesellschaft v. Armstrong, L. R. 9 Q. B. 473.

<sup>2</sup> Grébert-Borgnis v. Nugent, 15 Q. B. D. 85.

to contract, and judgment is entered against B. for damages and costs. B. sues A. for the amount of the judgment. A. admits his liability for damages, but denies all responsibility for costs. The costs are recoverable as damages reasonably to be supposed to have been in the contemplation of the parties.<sup>1</sup>

(g) B. having contracted to sell and deliver to a railroad 400 tons of steel-capped rails, engages the defendant to supply the rails, the latter having notice of the purpose intended. B. has a patent for capping the rails, and there is no market price for such an article. B. is entitled, on breach, to the profits he would have realized.<sup>2</sup>

(h) Defendant agrees with K. to make for him certain dies to be used by him in the manufacture of lanterns. K. is not at the time engaged in the manufacture of lanterns, and does not contemplate engaging in it until the dies are finished. K. incorporates a company and assigns to it the contract, after which there is a breach of contract. The company claims to recover damages for rent of premises and employment of men after the breach. It does not appear that the defendant had any reason to suppose that such an expense would be incurred in advance of the delivery of the dies, nor could he anticipate that the contract would be assigned and that the assignee would employ men and premises to remain idle after the breach. Such damages cannot be allowed.<sup>3</sup>

(i) Cases containing machinery intended for the erection of a mill at Vancouver's Island are delivered to a carrier at Glasgow. The carrier knows only that it is intended for the erection of a mill. Part of the machinery, without which the mill cannot be erected, is lost, and the shippers are obliged to send to England to replace it. The measure of the damages is not the value of the use of the machinery, or profits which might have been made, but the cost of replacing the machinery.<sup>4</sup>

(j) F. agrees to furnish a coal company with a locomotive

<sup>1</sup> *Hammond v. Bussey*, 20 Q. B. D. 79.

<sup>2</sup> *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487.

<sup>3</sup> *Rochester Lantern Co. v. Stiles and Parker Press Co.*, 135 N. Y. 209.

<sup>4</sup> *British Columbia Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499; acc. *Thomas B. & W. Mfg. Co. v. Wabash St. L. & P. Ry. Co.*, 62 Wis. 642.

engine to draw coal cars. F. knows that it is for a track of unusual width, and that such engines are not to be hired when wanted. He does not know that the possession of the engine would enable the company to mine more coal than without it. The measure of damages for breach of the agreement is not the enhanced profits the company might have made, nor the cost of hiring another engine, but the difference of cost of transportation with and without the engine.<sup>1</sup>

---

It is in contract that the state of mind of the defendant becomes of importance. In contract, the question of liability is settled at once by the breach. The question is, What are the proximate damages of the breach? As already stated, the direct damages must be recoverable. These are generally the value of the promise, had it been performed. But this once determined, how far are other damages recoverable? The rule in tort, of responsibility for damages ensuing according to the usual course of things, will apply as far as it will go; but how far does it apply?

The difference between the two cases is this: In tort the defendant usually sets in motion some natural force which inevitably produces the result. In contract, the ordinary, natural, normal consequence of the breach is simply the loss of the value of the promise. It cannot be said that in the ordinary course of nature it is the consequence of failing to supply a shaft that a mill stops; it may be set going by another. Hence under ordinary circumstances the inquiry into the value of the thing or service promised ends the matter. But something more may appear. The contract may have been made to supply the shaft for a particular mill which is known by the defendant to be absolutely dependent upon it. Proof of this will increase the actual value of the promise — or

<sup>1</sup> *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365.

enlarge the scope of the consequences ensuing from its breach. The defendant does not now merely contract to deliver a shaft, but to deliver a shaft without which a mill must be stopped. On a breach this use of the shaft enters into the value of the contract which plaintiff has lost. The admissibility of evidence as to the contemplation of the parties does not show that the principles of compensation are different in contract and tort; such evidence is proof that, in case of a particular contract, a given consequence is a natural or proximate result of the breach of that particular contract.

## CHAPTER VI.

### AVOIDABLE CONSEQUENCES.

It is a universal rule, both in tort and contract, that for such consequences of the wrong or injury as the plaintiff might, with ordinary prudence have avoided, the defendant cannot be held responsible. The law assumes that a person injured will endeavor to reduce the amount of his loss within as narrow limits as possible, and if he does not do so, the consequences are not the proximate result of the defendant's act, but of his exercising, or imprudently neglecting to exercise his own will.

It is sometimes said that a person who neglects to prevent the consequences of another's wrong, fails in a duty;<sup>1</sup> but since the result of neglecting it falls not on another, but on the person himself in fault, it seems to be one of those self-regarding duties which are outside the domain of the law.

It accords more with principle, as illustrated in the decisions, to regard consequences which might have been avoided and for which, therefore, no recovery can be had, as due to the plaintiff's own negligence, and thus not flowing proximately from the cause of action. But for the intervention of the plaintiff's independent will, they could not have occurred.<sup>2</sup>

The doctrine of contributory negligence differs from that of avoidable consequences in an important respect. Contributory negligence takes away the cause of action itself; for the question of avoidable consequences to arise,

<sup>1</sup> *Miller v. Mariner's Church*, 7 Gr. 51.

<sup>2</sup> *Loker v. Damon*, 17 Pick. 284.

it is necessary that a cause of action should first exist. But the principle from which they spring is the same,—that the defendant cannot be held responsible for anything of which the real cause is the plaintiff's negligence; or as the Supreme Court of the United States has said: "One who by his negligence has brought an injury upon himself cannot recover damages for it."<sup>1</sup> The difference between contributory negligence and the doctrine of avoidable consequences is continually seen in personal injury cases. A railway collision occurs, which is due to the negligence of the company, and in which the plaintiff's arm is broken; he is entitled to damages. It appears that but for the fact that his arm was outside the car window at the time, he would not have been injured; his cause of action is gone. It appears that he has a cause of action, but that owing to his neglect to procure proper surgical advice, he has lost his arm altogether; for this head of damage he cannot recover.

In tort, the line of distinction between the two may not always be easy to draw. But in contract, it is plain enough, for here, a breach being shown, the plaintiff is always entitled to nominal damages, and it is only the question of avoidable consequences which can arise. In contract there is no such thing as contributory negligence. And so it has been held that in an action founded upon a contract of service, a plea that plaintiff might have procured employment elsewhere (and so reduced the damage) is not a bar to the action.<sup>2</sup>

As the plaintiff is expected to take such steps as may be necessary to prevent damage, the expense of such steps is chargeable to the defendant, or in other words the expense of avoiding the consequences of the defendant's act is recoverable, provided it be reasonable.

<sup>1</sup> Railroad Co. v. Jones, 95 U. S. 439, 442.

<sup>2</sup> Armfield v. Marsh, 31 Miss. 361.

In cases of contract the rule is sometimes put in a different way. The plaintiff is said to be entitled to the benefit of the contract, and if the defendant does not perform, he may *perform for him*, and charge the expense to him. Thus a traveller who is entitled to a conveyance, may, on failure to furnish it, hire another, and charge the person failing with the expense.<sup>1</sup> But the result is the same. What he does is not really to perform for the defendant, but to take such steps as prudence dictates, and the expense of such steps is a natural and proximate consequence of the breach. In the case last cited, Mellish, L. J., points out that one mode of determining what should be done is to consider what a person in the position of the injured party would, as a reasonable man, have done, had he been placed in the same position without fault on the part of the defendant, *i. e.*, what it was his business, as a man in the exercise of ordinary care, to do. This principle will sometimes have the result of enhancing instead of reducing damages.<sup>2</sup> The plaintiff, for instance, in reasonably endeavoring to escape the consequences of the act of the defendant, incurs a new injury; for this he may recover.<sup>3</sup>

A common instance of the rule is in contracts of hiring. The rule, however, that defendant can reduce damages by showing that plaintiff employed or might have employed *his time* to advantage, does not apply to every contract. It applies to contracts of hiring, because in them the party injured can earn no more than single wages, and if he gets that in any way his loss will only be nominal. But in the case of other contracts, the plaintiff is entitled to the bene-

<sup>1</sup> Hamlin v. Gt. N. Ry. Co., 1 H. & N. 408; LeBlanche v. L. & N. W. Ry. Co., 1 C. P. D. 286.

<sup>2</sup> This of itself shows that the rule does not rest upon a *duty to reduce damages*.

<sup>3</sup> Jones v. Boyce, 1 Starkie, 493.

fit of his bargain, and may perhaps be entitled to the benefit of many other contracts. To go into evidence to show that he has made as much, or might have made as much, in other ways, as if the contract had been performed, is irrelevant. A contract, for instance, to build a house, does not preclude the contractor from making fifty similar contracts, and enjoying the benefit of them all.<sup>1</sup>

The question of avoidable consequences, so far as it is one of negligence, is for the jury, under proper instructions. The question, for instance, whether moderate expense and ordinary effort would have lessened the damages is one of fact.<sup>2</sup> Cases of course may often arise in which the matter is so plain that there is nothing for the jury to consider; but this is true of all questions of fact. The burden of proof is always on the defendant to show that plaintiff has, or might have, reduced damages.<sup>3</sup>

It is hardly necessary to say that in requiring the plaintiff to reduce damages, in the exercise of ordinary care, the precautions called for are only such as are within his rights. He is not to violate a contract with a third party,<sup>4</sup> nor to commit a trespass.<sup>5</sup>

# RULES.

12. *Consequences of a tort or breach of contract avoidable by the plaintiff in the exercise of ordinary prudence are considered in law as remote; no damages can be recovered for them.*

13. *Reasonable expense or injury incurred in the effort*

<sup>1</sup> See the whole subject fully considered in *Wolf v. Studebaker*, 65 Pa. St. 459.

<sup>2</sup> *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544.

<sup>3</sup> *Hamilton v. McPherson*, 28 N. Y. 72.

<sup>4</sup> *Leonard v. N. Y., etc., Tel. Co.*, 41 N. Y. 544, 566.

<sup>5</sup> *Chic. R. I. & P. R. R. Co. v. Carey*, 90 Ill. 514; *Fromm v. Ide*, 68 Hun, 310.

*to avoid such consequences is a proximate consequence.*

14. *Damages arising from acts of the defendant preventing the plaintiff from avoiding such consequences are proximate.*

#### ILLUSTRATIONS.

(a) In an action of trespass it appears that D. broke down L.'s fence in November, but that L. did not repair it till May. Cattle, getting in, have destroyed the next year's crop. The measure of damage is not the value of the crop, but the cost of repairing the fence.<sup>1</sup>

(b) The cause of action is the failure of a train to stop and take on a passenger. He walks to his destination, exposes himself to extreme cold, and injures his health. Evidence is offered to prove that he might have taken the next train, or procured another conveyance. To exclude such evidence is error.<sup>2</sup>

(c) S., a married woman, sues defendant town for injury caused by a defective highway. After the injury, and while under medical treatment, she becomes pregnant, and her pregnancy enhances the effects of the injury. It does not appear that she had any reason to anticipate such a consequence. Defendant requests that the jury be directed not to allow for any increase of damage through the pregnancy. There is no error in refusing this instruction.<sup>3</sup>

(d) A. employs B. to effect insurance upon his property, which B. neglects to do. A., knowing of this, cannot stand by and hold B. for any loss which may occur.<sup>4</sup>

(e) An express company, employed to deliver a premium on a policy of insurance to the insurer, fails to do so, and the policy lapses. To recover substantial damages the insured must show that he used all reasonable efforts to prevent the lapse, or to procure reinstatement.<sup>5</sup>

<sup>1</sup> *Loker v. Damon*, 17 Pick. 284.

<sup>2</sup> *Ind. B. & W. Ry. Co. v. Birney*, 71 Ill. 391.

<sup>3</sup> *Salladay v. Dodgeville*, 85 Wis. 318.

<sup>4</sup> *Brant v. Gallup*, 111 Ill. 487.

<sup>5</sup> *Grindle v. Eastern Express Co.*, 67 Me. 317.

(f) A servant is discharged without lawful cause. The amount which he earns, or might, with reasonable diligence, have earned in other employment, must be allowed in reduction of damages.<sup>1</sup>

(g) B., in charge of a vessel, is subjected to expense in getting her off from an unlawful obstruction in a navigable river placed there by the defendant. For this expense he can recover.<sup>2</sup>

(h) In an action on the case for taking a horse and wagon, plaintiff claims to recover, by way of special damages, the value of time and money spent in searching for the property; it appears that the search was reasonable under the circumstances. The items claimed are recoverable.<sup>3</sup>

(i) A passenger in a stage-coach is placed, by a defect in its construction for which the owners are responsible, in such a situation of peril as to make it a reasonable precaution for him to leap from it. Had he remained in his seat, he would have been safe; by jumping he sustains a serious injury. For this injury he can recover.<sup>4</sup>

(j) A horse is injured, and rendered entirely worthless. The plaintiff, however, having reason to believe that a cure can be effected, expends money for this purpose. He can recover the money so spent, in addition to the value of the horse.<sup>5</sup>

(k) A passenger delayed through the fault of a railway company, hires a special train for the purpose of reaching his destination at S. He has no business or engagement in S. which requires his being there at any particular time. Such an expense is unreasonable, and he cannot recover it.<sup>6</sup>

(l) The evidence shows damage to a machine and that the cost of repairs would have equalled the price of a new machine. It is held that this rule of avoidable consequences does not apply.<sup>7</sup>

<sup>1</sup> Sutherland v. Wyer, 67 Me. 64.

<sup>2</sup> Benson v. Malden & Melrose Gas Light Co., 6 All. 149.

<sup>3</sup> Bennett v. Lockwood, 20 Wend. 223.

<sup>4</sup> Ingalls v. Bills, 9 Met. 1.

<sup>5</sup> Ellis v. Hilton, 78 Mich. 150.

<sup>6</sup> Le Blanche v. London & N. W. Ry. Co., 1 C. P. D. 286.

<sup>7</sup> Thomas B. & W. Mfg. Co. v. Wabash, St. L. & P. Ry. Co., 62 Wis. 642.

(m) A farm is let, and possession is refused. In an action by the lessee, the lessor is permitted to prove that the plaintiff had engaged in another occupation more profitable than farming. This is error.<sup>1</sup>

(n) The cause of action is damage arising from a trespass committed by a boom company. The damages cannot be reduced by proof that the company declared its intention to commit the trespass, and that the plaintiff might by anticipating the wrong have avoided its consequences.<sup>2</sup>

(o) C., having been engaged by defendant, as superintendent of its railroad, for a year, is discharged without cause, and after notifying defendant of his readiness to complete the contract, remains unemployed during the remainder of the year. *Prima facie*, he is entitled to his full salary; to reduce his damages, defendant must show affirmatively that he had an opportunity of obtaining other employment of the same kind and description.<sup>3</sup>

<sup>1</sup> Wolf v. Studebaker, 65 Pa. St. 459.

<sup>2</sup> Plummer v. Pen. Lumbering Ass., 67 Me. 363.

<sup>3</sup> Costigan v. Mohawk & H. R. R. Co., 2 Den. 609.

## CHAPTER VII.

### NOMINAL AND EXEMPLARY DAMAGES.

It is a fundamental principle of the common law that any invasion of a right imports legal injury, and gives a right of action for damages; and if the amount of injury be trifling, or in many cases even if no injury can be shown, the plaintiff is still entitled to what are called nominal damages; that is, a verdict for some nominal sum, which at once establishes his right or title. By another rule no less important, whenever a person omits to govern his conduct by that standard of care for the rights of others which the law exacts, and actual damage ensues, he is responsible for the consequences, although, had no damage ensued, his act might have been indifferent.

#### RULE.

15. *Whenever a breach of contract, or a tort is established, the plaintiff is entitled to nominal damages.*

#### ILLUSTRATIONS.

(a) In an action by A., who has a right to use the water of a stream, for the diversion of it by a riparian owner higher up, the court charges the jury: 1. That the question must be "determined with reference to the land as it was, and not with reference to the future for an instant;" 2. That the question is whether the diversion of the water left the stream "to a material and appreciable extent, insufficient for the purposes of plaintiff's business;" on the other hand, plaintiff's request to charge that his right to maintain the action and recover nominal damages does not depend upon his showing actual or perceptible

damage, but solely upon the question of a perceptible and material reduction of the volume of the water, is refused. On appeal the judgment is reversed, and a new trial granted. The plaintiff's request should have been granted, while the charge actually given was erroneous.<sup>1</sup>

(b) A firm, dealing in grain, telegraphs in May to its agent to buy twenty thousand bushels of wheat, deliverable in June. After the message has been sent, wheat fluctuates in price so that had the message been acted upon, the firm might have made a loss. The message, however, is never delivered. The firm is entitled to nominal damages.<sup>2</sup>

(c) A riparian proprietor erects works which have the effect of fouling the water below him. This pollution of the stream, however, does no actual damage, because the water had been already so polluted by similar acts of mill-owners and dyers, still higher up, that the additional fouling does not make it less applicable to useful purposes than it was before. Nevertheless, a proprietor lower down is entitled, in an action of tort, to nominal damages.<sup>3</sup>

(d) In an action of trespass it appears that the trespass consists in having taken possession of a mill, in such a condition that the profits could not have exceeded the cost of repairs. The trespasser erects a new one in its place, so that the result is a large increase in the value of the property. The owner is entitled to nominal damages.<sup>4</sup>

With regard to breaches of contract, there is no difficulty in applying the above rule, as it is impossible to conceive of a breach of contract which does not give rise to a right of action. But with regard to torts, it will be perceived that unless we go through the whole body of actionable wrongs, we shall not be able to divide all the classes of cases in which the right to damages is dependent merely on proof of the defendant's acts, from those in

<sup>1</sup> *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293.

<sup>2</sup> *Hibbard v. W. U. Tel. Co.*, 33 Wis. 558.

<sup>3</sup> *Wood v. Wand*, 3 Exch. 748.

<sup>4</sup> *Jewett v. Whitney*, 43 Me. 242.

which it is necessary to couple with this some proof of actual damage to the plaintiff. Some little examination of the more common classes of action, may, however, be useful.

It may be said in the first place that with regard to trespass upon property, whether real or personal, the right of action, independent of actual damage, is probably as universal as in the case of contracts. This, so far as real estate is concerned, is because any trespass is an act which, if not protected against, may be used by the trespasser as evidence in favor of his own ownership ;<sup>1</sup> consequently for any trespass upon lands (and interference with incorporeal hereditaments, such as easements, comes practically under the same head, for though technically a common-law action of trespass does not lie, still adverse enjoyment ripens after lapse of time into ownership) a right of action always exists, independent of whether actual injury is inflicted or not. And the same principle applies to all interference with personal property, all cases of conversion, interference with patents, trade-marks, and copyrights.

Nor is proof of damage necessary in all that class of actions which are given for the protection of what are commonly called personal rights, — malicious prosecution, false imprisonment, enticement, harboring, seduction, assault, assault and battery, libel.

On the other hand, to sustain an action in cases of deceit or negligence, some proof of damage is obviously necessary, for neither falsehood nor want of due care in the management of one's affairs, or in one's conduct, are actionable in themselves — apart from their consequences. Nuisance, and the violation of the right of lateral or subjacent support, are peculiar cases, because they come from the exercise of ordinary property rights, but which *in case* they cause damage, become actionable. In slander our

<sup>1</sup> *Chapman v. Thames Mfg. Co.*, 13 Conn. 269.

law divides defamatory spoken words into two classes: first, where such words are assumed by the law to *import* damage; second, all others. In the first class, the words being slanderous *per se*, no proof of damage is required.

There is one species of action which is very frequent both in England and the United States as to which there is on the subject of nominal damages a conflict of opinion in the two countries, — that of actions against public ministerial officers. In England it is said that while it is the duty of a sheriff to make a true return to a writ, and to arrest a debtor on proper process, still the duty is imposed upon him only for the benefit of the creditor, and if he can absolutely negative the possibility of any advantage enuring to the creditor from the performance of the duty, the plaintiff will not be entitled to nominal damages.<sup>1</sup> In this country nominal damages are in some jurisdictions given for every breach of duty by a public officer.<sup>2</sup> It is not necessary here to go into this matter fully. It is merely mentioned for the purpose of calling attention to the distinction between the class of cases in which proof of damage is required to support an action, and those in which nominal damages are recoverable in any event. Actions against public officers may be actions of tort founded upon a public duty, or actions upon the official bond usually given in such cases to secure the performance of that duty. In either case, the decision of the question whether the plaintiff should recover nominal damages will depend upon whether we regard the right of the plaintiff as wholly dependent upon damage, or whether we regard the plaintiff as having some right which the wrong-doing of defendant invades.

<sup>1</sup> Mayne on Damages (5th ed.), 6; Williams v. Mostyn, 4 M. & W. 145; Stimson v. Farnham, L. R., 7 Q. B., 175.

<sup>2</sup> Lafin v. Willard, 16 Pick. 64; Lawrence v. Rice, 12 Met. 535; Mickles v. Hart, 1 Den. 548.

Upon the whole, looking as well at the general rule as at the exceptional cases, it may be said that the injury is looked upon as the invasion of a *contract, property, or personal right inherent in the plaintiff*, whenever nominal damages are recoverable; wherever, on the other hand, the primary notion is the breach by the defendant of a duty, producing damage to others, then damage is the gist of the action.

---

In all actions of tort<sup>1</sup> it is the rule in most jurisdictions that the jury may give damages beyond the strict limit of compensation, when the act complained of has been committed under circumstances of aggravation, and thus, by a heavier verdict than the rule of compensation would call for, punish the defendant and hold him up as an example to others.<sup>2</sup>

#### RULE.

16. *In all cases where a tort is attended by circumstances showing evil motive or wanton disregard of the plaintiff's rights, the jury may, in its discretion, give damages in excess of compensation, by way of example and punishment.*

#### ILLUSTRATIONS.

(a) The action is for trespass for false imprisonment under a warrant plainly illegal. The court refuses to interfere with a verdict for £300 damages, though it appears that so far as actual injury is concerned £20 might have been enough.<sup>3</sup>

<sup>1</sup> The rule is the same in actions for breach of promise of marriage; this is an anomaly which will be explained elsewhere.

<sup>2</sup> *Emblen v. Myers*, 6 H. & N. 54; *Day v. Woodworth*, 13 How. 363, 371; *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489; *Dalton v. Beers*, 38 Conn. 529; *Harrison v. Ely*, 120 Ill. 83; *Bergmann v. Jones*, 94 N. Y. 51; *Goddard v. Grand Trunk Ry.*, 57 Me. 202.

<sup>3</sup> *Huckle v. Money*, 2 Wils. 205.

(b) The case is a proper one for exemplary damages, but it appears on appeal that the jury probably understood the charge of the court to be that the plaintiff was entitled to such damages of right. Judgment is reversed and the cause remanded for a new trial.<sup>1</sup>

It is clear that as late as the middle of the last century, in actions of tort, the jury still retained most of its early power, and in certain cases where there were circumstances of aggravation, large verdicts were spoken of as being of an "exemplary" nature.<sup>2</sup> As rules in ordinary cases became defined and fixed, there emerged from the body of torts a certain class of cases which stood by themselves, *i. e.*, torts showing wilful motive, or wanton negligence as to the consequences of one's acts. In such cases as these "exemplary" verdicts were felt to be peculiarly appropriate, and from them has been developed the modern doctrine of exemplary damages.

In some jurisdictions<sup>3</sup> the doctrine has been repudiated, and the principle of compensation universally applied in all cases of torts. The objections urged against the doctrine have been, first, that it is at variance with the general principles of the law of damages; second, that the use of the form of a compensatory verdict to *punish* the defendant is unjust; third, that if punishment is to be inflicted the defendant should not be deprived of his right (as in a crimi-

<sup>1</sup> *Snow v. Carpenter*, 49 Vt. 426 acc.; *Wabash, St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296; *Louisville & N. R. R. Co. v. Brooks*, 83 Ky. 129; *New Orleans, St. L. & C. R. R. Co. v. Burke*, 53 Miss. 200. The contrary is maintained in Wisconsin, where it is held that if the facts are such as to make exemplary damages proper, the jury *must* give them. *Hooker v. Newton*, 24 Wis. 292. No such rule is recognized elsewhere.

<sup>2</sup> *Huckle v. Money*, 2 Wils. 205.

<sup>3</sup> *E. g.* *Massachusetts, Barnard v. Poor*, 21 Pick. 378; *New Hampshire, Fay v. Parker*, 53 N. H. 342; *Colorado, Greely, S. L. & P. Ry. Co. v. Yeager*, 11 Col. 345; *Nebraska, Riewe v. McCormick*, 11 Neb. 261.

nal court) to have the offence proved "beyond a reasonable doubt;" fourth, that the extent of the punishment is left to the jury, instead of the court, as in a criminal trial, and that they may, and frequently do, assess the damages at a sum greater than the fine provided by statute for the same act.

These objections have not generally prevailed. That the rule is an anomaly may be conceded; but that it tends to produce injustice cannot be made to appear. In the first place, whenever juries are not allowed to give exemplary damages, they may still give compensation for wounded feelings, which are entirely at large; and in the second place, the suggestion of injustice rests upon the mistaken assumption of double punishment *for the same offence*. But the offences punished are really different. In the civil action it is an offence against the plaintiff; in the criminal, the offence is against the community. Thus, in libel, the plaintiff recovers strictly for damage to his reputation, and if exemplary damages are given, they are given to punish the defendant for his wantonness or malice in attacking the plaintiff; but a criminal prosecution for libel is founded on the tendency of the libel to provoke a breach of the peace, and there is no reason where the same act produces two different species of injury that both should not be redressed.<sup>1</sup> The mere fact that the jury fixes the measure of punishment is not an argument against it. This is not an unknown procedure in the criminal courts, and the only other objection to it — that juries may be under the influence of passion or prejudice. — is of no weight, because here, as in every other case, the verdict may be set aside if excessive. It may be said also that all damages, *so far as the defendant is concerned*, are punitive in their nature. To compel the defendant to

<sup>1</sup> *Brown v. Swineford*, 44 Wis. 282; *Fry v. Bennett*, 4 Duer, 247; *Brown v. Evans*, 8 Sawy. 488.

make reparation is to inflict a penalty upon him. This is usually measured by the amount of the injury; but it need not be, and statutes have frequently been passed allowing double or treble damages in cases of wanton injury to property; when plainly the main object is punishment.<sup>1</sup> Such double or treble damages are a species of exemplary damages.

It follows from these considerations that the fact that the defendant is liable to a criminal prosecution or has actually paid a fine to the State cannot bar nor even mitigate exemplary damages.<sup>2</sup>

This rule seems to be the inevitable consequence of all the considerations by which the doctrine of exemplary damages is supported, and therefore, wherever the doctrine is recognized, cases holding that it does not apply to actions for wrongs which are also criminal offences, on the ground that the defendant should not be twice punished for the same offence;<sup>3</sup> cases holding that evidence of a conviction and fine may be given for the purpose of mitigating exemplary damages<sup>4</sup>—or that it is a bar;<sup>5</sup> cases attempting to distinguish between punitive and exemplary

<sup>1</sup> *Barnes v. Jones*, 51 Cal. 303; *Reed v. Davis*, 8 Pick. 514; *Mich. L. & I. Co. v. Deer Lake Co.*, 60 Mich. 143; *Robinson v. Kime*, 70 N. Y. 147; *Brown v. Swineford*, 44 Wis. 282, 288.

<sup>2</sup> *Brown v. Evans*, 8 Sawy. 488; *Bundy v. Maginess*, 76 Cal. 532; *Jefferson v. Adams*, 4 Harr. 321; *Johnson v. Smith*, 64 Me. 553; *Elliott v. Van Buren*, 33 Mich. 49; *Sowers v. Sowers*, 87 N. C. 303; *Barr v. Moore*, 87 Pa. St. 385; *Edwards v. Leavitt*, 46 Vt. 126; *Brown v. Swineford*, 44 Wis. 282.

<sup>3</sup> *Murphy v. Hobbs*, 7 Col. 541; *Huber v. Teuber*, 3 McAr. 484; *Cherry v. McCall*, 23 Ga. 193; *Stewart v. Maddox*, 63 Ind. 51; *Austin v. Wilson*, 4 Cush. 273; *Fay v. Parker*, 53 N. H. 342.

<sup>4</sup> *Smithwick v. Ward*, 7 Jones L. 64; *Johnston v. Crawford*, 62 N. C. (Phillips) 342; *Sowers v. Sowers*, 87 N. C. 303; *Shook v. Peters*, 59 Tex. 393.

<sup>5</sup> *Gust v. Macpherson*, 3 Mont. Leg. News, 84.

damages in this regard ;<sup>1</sup> cases confusing exemplary with compensatory damages by holding damages for mental suffering, indignity suffered, &c., — to be “exemplary”<sup>2</sup> must be considered in conflict with the general current of authority, and opposed to principle.

It is a general rule of the common law that a master, or principal, is responsible for the torts of his agent or servant if committed *in the scope of his employment*, though neither authorized nor ratified by him. Different reasons have been given for the rule, but they are all more or less founded on the idea that one who authorizes another to perform certain acts for him, is himself the person who performs them, and if, in the course of their performance, torts are committed, he is himself the person who commits them. In the same way liability is imputed to corporate bodies for the acts of their agents and employees. It will be seen at once that when we come to consider the application of the rule of exemplary damages to this class of cases, we are involved in considerable difficulties. On the one side it is said that if we impute the tort of servant to master, we should impute the tort as a whole, with all its attendant circumstances of mitigation or aggravation ; and consequently that if it was of a wanton or malicious character the principal or master should be liable for the severest rule of damages just as much as for the act itself. This argument is perhaps reinforced by the consideration that otherwise cases of a peculiarly aggravated character may occur where all liability to exemplary damages disappears. The master is responsible in compensatory damages only ; having proceeded against him, no action for exemplary damages can be brought against the servant, for there must be at least nominal damages to support exemplary damages ; there is no right of action left

<sup>1</sup> *Meidel v. Anthias*, 71 Ill. 241.

<sup>2</sup> *Pegram v. Stortz*, 31 W. Va. 220 ; *Beck v. Thompson*, id. 459.

against him, and consequently the doctrine fails altogether of application.

On the other hand, it is said that to impute the liability for the tort is one thing; to go further and impute wrongful motive without any evidence of it is going much further; that to a wrongful intent knowledge is an essential requisite, and consequently to make a principal liable for the act of an agent, actual malice must be brought home to the master or principal.

The difficulty presented has been surmounted in one jurisdiction by allowing damages to be recovered for mental suffering caused by aggravated wrong committed by a servant, although exemplary damages are excluded. A railway conductor grossly insults a passenger by kissing her. The company is in no way to blame, and escapes responsibility for exemplary damages. For compensatory damages, however, it is responsible, and consequently, for the insult, a substantial verdict may be recovered.<sup>1</sup>

The logical difficulty of imputing the motive of a tort to a master is usually no greater than that of imputing the tort itself. The case very seldom happens in which a master directs, authorizes, or ratifies a tort, or is in any way morally responsible except from the single fact of employment of another in his service. The question how far the tort or its motive shall be imputed to the master is really one, like that of exemplary damages itself, of public policy. In the case of corporations, which act only by agents, there seem the strongest reasons for a severe rule.

The results of the application of the rule of exemplary damages to the relation of master and servant are therefore quite different in different jurisdictions.

<sup>1</sup> *Craker v. Chic. & N. W. Ry. Co.*, 36 Wis. 657.

## RULE.

17. *A principal or master is answerable in exemplary damages for the act of his agent or servant done in the scope of his employment, either (a) only when the principal or master expressly authorized the act as performed, or ratified it, or by gross negligence made it possible or (b) whenever the agent or servant, acting on his own responsibility, would have been so answerable.*

## ILLUSTRATIONS.

(a) A railroad company, by an armed force, organized and commanded by its vice-president and assistant general manager, attacks the agents and employees of another company in possession of a railroad, drives them away, and in so doing fires upon and injures one of them. In an action brought by him against the railroad, it is held that the jury may give exemplary damages.<sup>1</sup>

(b) The conductor of a train arrests a passenger in an illegal, wanton, and oppressive manner, the company not having in any way authorized or ratified the act. The company is not responsible in exemplary damages.<sup>2</sup>

(c) A brakeman acting in the course of his employment unnecessarily makes a violent attack upon a passenger. This is a proper case for a verdict for exemplary damages against the railroad.<sup>3</sup>

## RULE.

18. *To recover exemplary damages the plaintiff must establish the right to nominal damages or prove actual damage.*

## ILLUSTRATIONS.

(a) A. brings an action against county commissioners to recover damages for their wilful refusal to levy a tax to pay off a

<sup>1</sup> *Denver & R. G. Ry. v. Harris*, 122 U. S. 597.

<sup>2</sup> *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101; cf. *Haines v. Schultz*, 50 N. J. L. 481.

<sup>3</sup> *Hanson v. European & N. A. R. R. Co.*, 62 Me. 84.

judgment held by him. The plaintiff may recover exemplary damages, though his actual damage was merely nominal.<sup>1</sup>

(b) Under a statute giving a wife an action for damages to person and property caused through the intoxication of her husband by one who sells him liquor, the right of action depends on proof of actual damage. In case no such proof is made, exemplary damages are not recoverable.<sup>2</sup>

### RULE.

19. *Upon the question of exemplary damages, all circumstances tending to show the nature of the motive, are receivable in evidence.*<sup>3</sup>

### ILLUSTRATION.

(a) In an action against a railway company for unlawfully ejecting a passenger from its cars, evidence on the part of the conductor that at the time he ejected the plaintiff he believed that plaintiff had not surrendered any ticket, and that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent upon the question of exemplary damages.<sup>4</sup>

The question how far the motive of one can affect another also arises in the case of joint and several torts. In ordinary cases of trespass to person or property the plaintiff may bring his action against all, or any one or more, and he recovers damages as a whole, for all are

<sup>1</sup> *Wilson v. Vaughn*, 23 Fed. 229; *Hefley v. Baker*, 19 Kas. 9; *contra Stacy v. Portland Pub. Co.*, 68 Me. 279.

<sup>2</sup> *Ganssly v. Perkins*, 30 Mich. 492; *Meidel v. Anthis*, 71 Ill. 241.

<sup>3</sup> *Millard v. Brown*, 35 N. Y. 297.

<sup>4</sup> *Yates v. N. Y. C. & H. R. H. H. Co.*, 67 N. Y. 100. This is not true of the question of compensatory damages, because "if the plaintiff was unlawfully ejected from the cars, the good faith of the conductor would not be a defence, nor impair the right of the plaintiff to actual damages." "To have presented the point of immateriality properly upon the question of compensatory damages, the counsel for the plaintiff, when this evidence was offered, should have disclaimed any claim for any further damages." *Per* CHURCH, C. J., *ib.*

supposed to be equally guilty. But if one of the defendants has been actuated by a malicious motive, and another is merely technically guilty (responsible, *e. g.*, for nominal damages only), it is obvious that to fasten the motive of one upon the other would be unjust. Hence, in this case, the better opinion seems to be that if the plaintiff wishes to recover exemplary damages, he must select the defendant whom he wishes to hold to the severer rule, and proceed against him.<sup>1</sup>

#### RULE.

20. *Exemplary damages may be given in cases of gross negligence.*

To understand what is meant by this rule it is necessary to notice briefly what are known as the "three degrees of negligence." In *Coggs v. Bernard*,<sup>2</sup> nearly two centuries ago, Lord Holt appeared to classify negligence as slight, ordinary, and gross, and the result was the doctrine of three correlative degrees of care,—slight negligence being want of great care, ordinary negligence being want of ordinary care, and gross negligence being want of slight care. The matter has been much discussed since that time, and it has been made very clear that in determining the question of *liability* this classification has no significance. This question is solely, Has the defendant shown that lack of care which the law requires under the circumstances of the case?<sup>3</sup>

But when we look not at the question of liability, but at that of *culpability* and motive (which come into view the moment the jury is asked to give exemplary damages) the

<sup>1</sup> *Clark v. Newsam*, 1 Ex. 131; *McCarthy v. De Armit*, 99 Pa. St. 63.

<sup>2</sup> 2 Ld. Raymond, 909.

<sup>3</sup> *Wilson v. Brett*, 11 M. & W. 113; *The New World v. King*, 16 How. 469; *Perkins v. N. Y. Cent. R. R. Co.*, 24 N. Y. 196, 207; *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489, 495.

term gross negligence adds something to the notion of liability. The dictum of Rolfe B., in *Wilson v. Brett*, that "gross negligence" is only negligence with a "vituperative" epithet is not accurate. The epithet is not vituperative, but condemnatory; and in using it the language of the law merely conforms to that of ordinary life. Until we are ready to affirm that gross negligence itself cannot exist, the term will continue in use. If this view is sound, the negligence which establishes liability is the absence of the care which the law requires under the circumstances of the case; gross negligence means a gross case of it. The precise point at which negligence becomes gross negligence is one which it is impossible to define in advance, but which juries probably find it easy to pass upon. In a recent Florida case, the court has attempted a definition as follows: It is not proper to charge a jury that "gross negligence" will warrant exemplary damages; they should be instructed that there must be "that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."<sup>1</sup>

<sup>1</sup> *Florida Southern Ry. Co. v. Hirst*, 30 Fla. 1, 39.

## CHAPTER VIII.

### ELEMENTS OF INJURY.

COMPENSATION in courts of law is necessarily awarded in money. The injuries for which it is awarded are of various kinds, according as they affect the person, property, or rights of contract. They may be divided into three entirely distinct species: 1. Damage to legal right only (nominal damages). 2. Substantial injuries of a temporal or pecuniary character. 3. Injuries also substantial, but non-temporal and non-pecuniary in their effect. Nominal damages have already been considered.

It should be noticed at the outset, that the difficulty, or even impossibility, of estimating with certainty in money the amount of injury done, is never a reason for refusing redress; <sup>1</sup> the rule of certainty has no application here. If this difficulty were allowed to stand in the way of compensation, many injuries would fail of redress altogether.

Where injuries are spoken of as pecuniary, the meaning of the phrase is either that money itself has been lost, or that the damage is such as can be, and usually is, in ordinary estimation, measured by a pecuniary standard, — loss of time, for instance, or the loss of the use of property. Breaches of most forms of contract, and interference with property rights as such, *i. e.*, where the question is solely that of the value of property taken, detained, or damaged, fall under this head. In all other cases, *i. e.*, where the *person*, taken in its largest sense, is affected, while the award of damages must be pecuniary, the injury is at least

<sup>1</sup> Ballou v. Farnum, 11 Allen, 73.

in part non-pecuniary. The pain of a blow, the mental suffering caused by libel, the loss of the society of a wife, are instances. The mere statement of their nature shows that there is no pecuniary *standard* which can be applied, and in all such cases the damages are, as has already been explained, very much at large, or in the discretion of the jury. One case serves little as a guide in another, and this whole field of the law is widely separated from the other, in which exact methods of computing damages can generally be arrived at.

If the elements of injury in actions of contract were always, as they are generally, pecuniary, damages for them would be entirely measured by fixed rules of law. But exceptional cases may exist. A contract usually involves only pecuniary elements of injury, because the loss by being deprived of the benefit of the promise is usually of a pecuniary character. This may be said of all contracts of service, of bills and notes, insurance, sales, warranty, indemnity, agency, &c. But there are contracts embodying promises of an entirely different nature. One of the most evident elements of damage in the case of the breach of a promise to marry is injury to the feelings; the same may often be true in cases of breach of a contract to convey the news of an important fact with regard to a family, such as death or marriage. It is to such cases as these that we must direct our attention if we wish to know whether the rule that on breach of contract only pecuniary elements of injury are considered is universal.

In actions for the breach of contract for the conveyance of telegraphic messages, the matter is obscured by the fact that the plaintiff is generally at liberty to bring either an action of tort or contract, or in jurisdictions where there is only one form of action, an action as to which it may be impossible to tell whether it sounds in tort or contract. Now, if the action is tort, as already

explained, the non-pecuniary elements are to be considered as of course.

As to physical pain, for instance, resulting from personal injury, there has never been any question. This element of injury is so closely connected and bound up with the material damage suffered that it is always sued for and allowed.<sup>1</sup> In inconvenience, on the other hand, we have a kind of injury which may be material, and may be purely mental in effect. For physical inconvenience damages have been specifically allowed, even in contract,<sup>2</sup> while inconvenience producing mere annoyance has been disallowed.<sup>3</sup> These cases illustrate two rules elsewhere stated: (1) That in contract, as a rule, nothing is allowed except for material damage, and (2) the rule that where the most ordinary and obvious measure of compensation fails, the law reverts to an alternative rule, if one can be found. Both were cases of the breaches of contract of carriage. In the second, damages were refused for disappointment of mind; in the first, where the passenger was put down at a wrong station, it was admitted that he might, had there been a carriage there, have hired it and charged the expense to the carrier. This was the precise value of the performance of the contract to him. But there was no carriage; he was allowed an analogous measure of compensation for the physical inconvenience of having to walk. This inconvenience, which money paid for a carriage would otherwise have obviated, was the precise measure of the advantage of the contract of which the plaintiff had been deprived.

A religious society brings an action against a railroad

<sup>1</sup> *Ransom v. N. Y. & E. R. R. Co.*, 15 N. Y. 415; *Lake Shore & M. S. Ry. Co. v. Frantz*, 127 Pa. St. 297; *Phillips v. South Western Ry. Co.* 4 Q. B. D. 406.

<sup>2</sup> *Hobbs v. London & S. W. Ry. Co.*, L. R. 10 Q. B. 111.

<sup>3</sup> *Hamlin v. Great Northern Ry. Co.*, 1 H. & N. 408.

for a nuisance consisting of a building for housing locomotive engines established close by a building used for Sunday-schools and public worship by the society. It is proper for the court to charge the jury that the congregation would be entitled to recover damages (although their property might have increased in value) because of the inconvenience and discomfort suffered by them.<sup>1</sup>

Many other cases might be cited to show that where material damage has been occasioned, not only physical pain but inconvenience and discomfort will be compensated. A more important question is when and under what circumstances mental suffering, accompanied or unaccompanied by any physical damage is an element of legal injury.

The question has been much confused by the dictum of a judge of high reputation. In *Lynch v. Knight*,<sup>2</sup> decided by the House of Lords in 1861, the action was brought in the name of K. and his wife for slander of the wife. The words complained of (addressed to K.) imputed to her that she had almost been seduced by C. before her marriage, and stated that K. ought not to allow C. to enter his house. The special damage was that K. believed the story, and forced his wife to go back to her father, whereby she lost the *consortium* of her husband.

The defendants demurred on the ground that the damage was too remote; that the damage was not a "temporal" (*i. e.*, material) loss; and that the damage came from K.'s own wrongful act. Lord Brougham, Lord Cranworth, and Lord Wensleydale delivered opinions, and Lord Brougham incorporated in his opinion that of the late Lord Chancellor, Lord Campbell, who had previously died, after hearing the argument. The words were clearly not actionable in

<sup>1</sup> *Baltimore & Potomac R. R. v. Fifth Baptist Church*, 108 U. S. 317.

<sup>2</sup> 9 H. L. C. 577.

themselves, there was no allegation of mental anguish in consequence of the slander,<sup>1</sup> and the only question in the case was whether the wife's loss of *consortium* was proximate special damage of a material character, such as would support an action for slander. The opinions of Lord Brougham, Lord Cranworth, and Lord Campbell all rest on the fact that the damage was not proximate. To send his wife away on the strength of such a story without inquiry was not a natural consequence. This decided the case, and there was no need of anything further. Lord Wensleydale, however, undertook to show that apart from this the action could not be maintained, on the ground that the loss of the *consortium* of the husband could, in a wife, only produce mental suffering or anxiety, not material damage, and that therefore, while he could sue for the loss of the wife's *consortium*, an action could not be brought in her name for the loss of his. He loses her service; but she does not lose her maintenance, as he is still bound to supply it; and without an averment to that effect, it cannot be supposed that he does not do so. Her only suffering is mental, and "mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested."<sup>2</sup>

This remark was *obiter*. The case had already been disposed of, *first*, because the damage was remote, and *second*, because, according to Lord Wensleydale's opinion, there was no material damage such as is required in *slander* to support the action. Consequently there was no reason to lay down any general proposition to the effect that there is a principle of law that mental suffering shall not be

<sup>1</sup> 9 H. L. C. 591.

<sup>2</sup> Id. 598.

redressed except where there is material damage. Yet these words have ever since been quoted as if they were the decision in the case.<sup>1</sup>

This case, then, cannot be regarded as having decided the question whether, and under what circumstances, mental suffering can be allowed for as an element of damages. But more than this, it has been repeatedly cited as authority for the proposition that except in cases of *physical* injury, mental suffering cannot be allowed for. There is nothing of the sort in the case. Lord Wensleydale's language is *material* damage. The latter is much wider than the former, including damage to estate, as well as bodily injury. But is it necessary to show damages even of this kind to recover for mental suffering?

The subject deserves the more attention because the line dividing cases which permit such recovery from those which do not is one which illustrates several peculiarities of the law of damages.

In the first place, with regard to this kind of damage the form of the action is still in many jurisdictions of the utmost importance, and the reason is a substantial one. For pure breaches of contract in general the governing principle, as has been already stated, that the elements of

<sup>1</sup> The importance of this case will, it is hoped, excuse this somewhat minute analysis. In this country a wife may in some jurisdictions bring an action for the loss of her husband's *consortium*. Cooley on Torts \*227, note 2, and *cas cit.* Why it should be supposed that the wife suffers no material damage from the loss of her husband's *consortium* in such a case as the above is hard to see. A married woman is generally supported by her husband's daily labor. If she is abandoned by him, the theory that he continues to support her seems rather forced; she has the right to pledge his credit for necessities, but what reason is there for supposing in a majority of cases that he has any credit? Besides this, is not turning a married woman out of her house, to the shelter and comfort of which she is entitled, a material damage?

injury are pecuniary in their nature, and consequently for mental suffering caused by the breach there is no redress. An illustration of this rule has just been given. In actions for breach of promise of marriage, however, the plaintiff is allowed to recover for injuries to her feelings.<sup>1</sup> And so it has been frequently held, in cases of failure to deliver a telegraphic message of such a character that the primary result is mental suffering,<sup>2</sup> that such damages may be given. The principle which underlies all such cases seems to be, in the language of the decision just cited, that "where other than pecuniary (*i. e.*, material) benefits are contracted for, other than pecuniary standards will be applied."

Viewed in this light the exceptions confirm the ordinary rule of exclusion. In the case of failure to deliver an article sold, or to render services contracted for, what both parties contemplate is their material advantage. It is impossible to contend that under the rule in *Hadley v. Baxendale*, they may be regarded as contemplating mental distress as the consequence of a breach.

But in cases in which the contract contemplates something quite different from material advantage, there seems no reason why non-pecuniary elements should not be considered.

One of the commonest instances of the recovery of damages for mental suffering in many American jurisdictions is that of actions for such injuries as would in other jurisdictions warrant exemplary damages. But here the recovery will often depend, in actions for personal injury (when there is a breach of contract as well as a tort), upon the form of the action.

M. brings an action of contract to recover damages against a railroad company for failure to carry him from S. to N.

<sup>1</sup> *Vanderpool v. Richardson*, 52 Mich. 336.

<sup>2</sup> *Wadsworth v. W. U. T. Co.*, 86 Tenn. 695.

It appears on the trial that the conductor wrongfully arrested the plaintiff at an intermediate station for evading payment of his fare, that he was detained in custody over night, and subjected to indignities. On the trial, M. is held entitled to recover damages for mental suffering. This ruling is erroneous. The action being one of contract, no such damages can be recovered.<sup>1</sup>

In all those jurisdictions in which exemplary damages are not allowed, mental suffering in all cases of aggravated torts is allowed for, as matter of compensation. For example, if the action is trespass accompanied by outrage, the plaintiff recovers for wounded feelings, when in another jurisdiction, the same facts would be ground for an exemplary verdict. This of course is strong proof that there is no rule of law that mental suffering is not a proper subject for compensation. But the question comes up also in jurisdictions which do allow exemplary damages, and it is settled that exemplary damages, when allowed, are *in addition* to compensatory damages.<sup>2</sup> Now the nature of the case may exclude the possibility of exemplary damages and yet be such as to raise the question of mental suffering. It has been seen that in many jurisdictions exemplary damages cannot be recovered against a principal for the wrongful but unauthorized act of his agent, because, though responsible for the *act*, the principal cannot be responsible for the *motive* of the agent. The damages accordingly must be limited to compensation, and it has been held in a carefully considered case that compensation may include damages for mental suffering.<sup>3</sup>

It must be admitted that, as a general rule, compensatory damages for injury to feelings are not given where exemplary damages are allowed. But this is because ex-

<sup>1</sup> *Murdock v. Boston & A. R. R. Co.*, 133 Mass. 15.

<sup>2</sup> *Harrison v. Ely*, 120 Ill. 83; *Mc Williams v. Bragg*, 3 Wis. 424.

<sup>3</sup> *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657.

emplary damages are given on proof of the very same facts of outrage, wanton carelessness, etc., which would in other jurisdictions warrant compensation for mental suffering, and hence the allowance of them does not show that there is any principle of law which excludes proof of mental suffering.

Enough has been said to show that mental suffering is allowed for in some cases as an element of damage. The question still remains, What is the governing principle?

The matter would be relieved of some of its difficulties if it were always borne in mind that there are many varieties of mental suffering. A slight or insult effected by spoken words produces one kind of mental suffering; an act may wound the feelings or affections, it may produce fear, anxiety, distress, etc. Now the common law does not regard mere slights and insults as actionable wrongs, and it is partly, perhaps, because these are among the acts most commonly productive of mental suffering that the inference has been drawn of an inherent unwillingness in the law to give damages for mental suffering in any case. But the real reason seems to be that, there being no right of action for such offences, there is no question of what the elements of damage are.

While it is not pretended that all the cases can be reconciled, the principles on which the subject rests are believed to be (1) that, as a general rule, mental suffering is not a cause of action; (2) that damages for it can only be allowed as a consequence of some recognized cause of action; and (3) that whether it will be taken into the account in a given case depends very much on the kind of act or omission complained of, *i. e.*, whether it is of such a character that mental suffering is a natural, normal, and proximate consequence.

To vary slightly Lord Wensleydale's dictum, we may say that whenever there is *legal injury*, since there is a

right to a verdict for nominal damages, there is, in a certain sense, material (not necessarily physical) damage, and therefore, a right of action once established, if mental suffering is the ordinary, natural consequence of it, mental suffering may be allowed for; otherwise not.

Supposing, then, that the character of the action as sounding in tort and contract is plain, a slightly different result must result in the two cases.

1. In tort, a complaint setting up mental suffering produced by some indifferent act of the defendant does not state a cause of action. The mere fact that A. has caused B. mental suffering does not give the latter a right to redress. Acts and threats may produce fright; insults and rude behavior may wound the feelings and cause great mental distress, but they are not necessarily actionable. And this for a variety of reasons. Insolent, rude, or brutal behavior will produce, or fail to produce, mental distress, according as the strength, courage, and sensitiveness of the person concerned is greater or less. What will greatly distress one person will only cause amusement to another, and the same person may be differently affected at different times. Now proof can only come from him; the defendant has no means of disproving what he may say on the subject; the evidence is incapable of certainty; and hence, were such an action allowed, it must always terminate in the plaintiff's favor.<sup>1</sup> 2. Mental suffering accompanying, and caused by, an actionable act or omission of any kind, may be an element of damage. The most common instance is that sort of mental suffering, fright and anxiety which attends upon a physical injury causing pain. 3. This is not confined to cases of physical injury, but includes every case where the plaintiff has a *right of action*, the nature of which is such that mental suffering is a direct consequence. 4. In contract, the breach alone gives a right of

<sup>1</sup> Terwilliger v. Wands, 17 N. Y. 54.

action; and if this entailed the right in every case to recover for mental suffering, the rule which makes the measure in ordinary cases of contract, pecuniary, would be completely done away. In contract, then, mental suffering is not allowed unless the subject of the contract is such that the breach itself *sounds* in mental suffering; *e. g.*, breach of promise. The cases are extremely rare. 5. Whatever the form of the action, damages for mental suffering are always rejected where the proof of them rests wholly in the evidence of the plaintiff, and they are consequently conjectural, or where there is not that connection between the cause of action and the damages which the law requires.

## ILLUSTRATIONS.

(a) Any attempt to do bodily harm, so as to put the person justly in fear of it, is actionable as an assault. Damages are recoverable, although no physical harm is done.<sup>1</sup>

(b) A. sues B. for injuring a horse in a brutal manner, accompanying the act with malicious insults. He is entitled to compensation for the injury to his feelings.<sup>2</sup>

(c) W. circulates a report about T. which causes him mental distress. The words in themselves are not actionable. This mental distress gives no right of action.<sup>3</sup>

(d) The words spoken are actionable. Recovery may be had for mental suffering caused by them.<sup>4</sup>

(e) The action is for personal injury. The plaintiff may introduce evidence showing loss of mental power.<sup>5</sup>

(f) The action is for wrongful expulsion of a railway passen-

<sup>1</sup> I. de S. v. W. de S., Y. B. Lib. Ass., fol. 99, pl. 60; *Beach v. Hancock*, 27 N. H. 223.

<sup>2</sup> *Kimball v. Holmes*, 60 N. H. 163.

<sup>3</sup> *Terwilliger v. Wands*, 17 N. Y. 54; *cf. Allsop v. Allsop*, 5 H. & N. 534.

<sup>4</sup> *Adams v. Smith*, 58 Ill. 417; *Swift v. Dickerman*, 31 Conn. 285.

<sup>5</sup> *Ballou v. Farnum*, 11 All. 73.

ger. The jury may give damages for the annoyance, vexation, and indignity.<sup>1</sup>

(g) The action is trespass upon lands, the plaintiff claiming to recover for the removal of the remains of his deceased child from a cemetery lot. It is proper to instruct the jury that if the evidence shows wanton disregard of plaintiff's rights, the jury may consider the injury to plaintiff's feelings.<sup>2</sup>

(h) The action is for neglecting to replace a furnace. The evidence is that the plaintiff's infant child was ill with bronchitis, and on account of the destruction of the furnace had to be taken care of in the kitchen. The plaintiff may recover on the score of anxiety and annoyance.<sup>3</sup>

(i) The action is for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The plaintiff may recover for mental suffering.<sup>4</sup>

(j) F. is ejected from a train, being compelled to jump off while the train is in motion, through fear of the conductor, who threatens to push him off. His fear is intensified by reason of his physical condition. His consequent mental suffering is a proper element of damage.<sup>5</sup>

(k) A telegram, informing plaintiff of the death of his brother and the time and place of his funeral, is not delivered. No damages for disappointment in not being informed in time to attend the funeral are recoverable.<sup>6</sup>

<sup>1</sup> *Chicago & Alton R. R. v. Flagg*, 43 Ill. 364.

<sup>2</sup> *Meagher v. Driscoll*, 99 Mass. 281.

<sup>3</sup> *Vogel v. McAuliffe*, 31 Atl. Rep. (R. I.) 1.

<sup>4</sup> *Larson v. Chase*, 47 Minn. 307.

<sup>5</sup> *Fell v. Northern Pac. R. R. Co.*, 44 Fed. R. 248; Cf. *Johnson v. Wells, Fargo, & Co.*, 6 Nev. 224; 3 Am. R. 245, where the authorities on the subject of the allowance of damages for mental suffering accompanying physical pain are collected.

<sup>6</sup> *Western Union Tel. Co. v. Rogers*, 68 Miss. 748. In this case the court says that the "long established and almost universal rule of law" is that no action will lie for damages for mere mental suffering, "disconnected with physical injury, and not the result of the wilful wrong of the defendant." Another reason, however, given by the court, is conclusive, that in this case the evidence of mental suffering must come wholly from the plaintiff, and was conjectural. In a case of the same

The foregoing cases seem to show that the allowance of damages for mental suffering is not prohibited by any principle of law. Wherever a rigid rule is allowed to have that effect, the result is that wrongs must often go undressed. Thus in a leading case in England where action is brought to recover for nervous shock caused a woman exposed to the danger of a railway collision we find a substantial verdict set aside, though the medical evidence showed that an illness has been caused by the fright.<sup>1</sup> And in this country, where, by negligence in blasting, rocks are thrown on to plaintiff's adjoining lands and buildings, it has been held that fear and anxiety are not proper elements of damage.<sup>2</sup>

sort in Tennessee, where a sister claimed damages for mental suffering caused by being prevented from attending her dying brother, it was held on demurrer that the action lay. There was a right of action independent of those damages, but the main question discussed was that of mental suffering. *Wadsworth v. W. U. Tel. Co.*, 86 Tenn. 695.

<sup>1</sup> *Victorian Ry. Comrs. v. Coultas*, 13 App. Cas. 222.

<sup>2</sup> *Wyman v. Leavitt*, 71 Me. 227.

## CHAPTER IX.

### LIMITATIONS OF INJURY.

WHEN the measure of damages in a given case is spoken of what is meant is the rule determining the extent of recovery in the particular class of action under consideration. Compensation is, however, often very much limited by the relation which the parties occupy towards one another, or to the question involved in the suit. Thus the damages flowing from a cause of action may be limited in time. The plaintiff may have a right to recover such damages as have accrued down to the date of his action; for subsequent damages he may be remitted to another action. Or he may be limited by his title; that is, the interest for which he claims compensation may not be the entire ownership. Again, the damages which he has suffered may be less in reality than they apparently are, through acts of the defendant. These different aspects of the matter will be briefly considered.

---

#### I.

The injury inflicted may terminate with the act which caused it, or it may be of a more lasting character. In an ordinary case of a trespass upon lands, if the trespasser has been ousted, the injury is at an end. In the case of a personal injury, the evil effects may last for life.

The principle which governs the assessment of damages in these cases is extremely simple. Only a single recovery

is allowed for a single injury. If at the date of the writ, the injury is complete, no recovery can be had beyond it. If it is of such a character that the effects of the cause of action are not yet exhausted, then the damages must cover the whole period during which they will continue.<sup>1</sup>

Where damages are assessed once for all, and cover future loss, they are called, in the case of contracts, entire damages; in tort they are usually spoken of as prospective damages. As a matter of fact all cases in which permanent damage to property is allowed for are cases of prospective damages, because in estimating the depreciation of value, effects must be taken into the account which last indefinitely. This is not usually noticed, as the damage shows itself at once in depreciation of market value. But the difference between the case of estimating the depreciation of rented real estate for all time, and that of estimating the loss, through an accident, of a human being's future earning capacity, is only one of degree.

The question may present itself in tort or contract, and in any species of action. A breach of contract may be entire, in which case the compensation will be entire. It may be a continuing contract; that is, one of which the obligation continues, though breaches occur. In this case, the fact of a breach does not necessarily bring the contract to an end, and the injury sued for is only that which has occurred down to the bringing of the action. It may

<sup>1</sup> It seems a consequence of this principle that the doctrine of *res adjudicata* applies to the questions of damage, as it does to every other fact within the issue. The rule of *res adjudicata* is that a judgment in one case is a bar to any subsequent suit involving the same cause of action, and that this bar includes not only such issues as were actually contested, but all which are in law considered as having been concluded. In England it has been held in trespass that a claim for damages which had been capable of recovery in a previous replevin suit is barred, whether they had been actually recovered or not. *Gibbs v. Cruikshank*, L. R. 8 C. P. 454.

be severable, in which case new breaches will give rise to new causes of action, and the compensation will be limited to the injury produced by the breach sued upon. A contract may even, though by its terms it is severable, be so affected by the acts of the parties that on a breach, the damages will be entire. J. agrees with R. to deliver coal at a certain price in May, June, July, and August, but in June refuses to go on with the contract, and both parties treat it as at an end. Suit is brought in July, and although the period of the contract has not yet run out, entire damages are given for the value of the contract as a whole.<sup>1</sup> The question of entirety of damages in contract is one depending, not on any fixed rule, but upon the nature and interpretation of the agreement and the acts of the parties under it.

In such a case as that just cited, the allowance of entire damages would seem in many cases to conflict with the rule of certainty. If the breach occurs and the suit is brought before the termination of the contract, the measure of damages, or value of the contract to the plaintiff, must be dependent on the future course of market prices, which is a matter of speculation. The same difficulty, however, occurs in torts, whenever prospective damages are given. The commonest instance is that of a personal injury case, where if the injury appears to be permanent, the plaintiff recovers damages covering the period of his natural life. These must, in the nature of things, depend largely on conjecture, which may frequently be contradicted by the event. The difficulty seems to be one which cannot always be overcome by treating the contract as severable, because it may cover a long period of time, and to remit the plaintiff to successive actions would often be less conducive to justice than to estimate the damage once for all as nearly as may be.

<sup>1</sup> *Roper v. Johnson*, L. R. 8 C. P. 167.

In tort, the rule of a single recovery for a single cause of action is usually easy of application. In cases, however, where the *damage itself* gives the action, nice questions often arise.

## RULES.

21. *For a single cause of action all damages incident to it must be assessed in a single suit.*
22. *For breach of an entire contract, the damages must be assessed in a single action.*
23. *For breach of a continuing contract, damages are recoverable only to the date of the writ.*
24. *For every breach of a divisible contract, a separate assessment of damages may be had.*
25. *In tort, the damages include all prospective injury from the cause of action which is reasonably certain.*

## ILLUSTRATIONS.

(a) T., the keeper of an office for procuring crews for vessels, in consideration of B.'s undertaking to provide necessary advances and supplies, promises to pay a certain sum of money for each man shipped and to repay advances. The contract is divisible, and every breach will support an action.<sup>1</sup>

(b) G. makes a contract to support her husband "when he is sober and well-behaved." The contract is a continuing one, and damages can only be assessed to the date of the writ.<sup>2</sup>

(c) R. agrees to support P. during life, and afterwards repudiates the contract so as to entitle the latter to treat it as entirely at an end. The damages must be assessed as of a total breach of an entire contract.<sup>3</sup>

(d) A. overflows B.'s land, comprising a half section. Suit is brought by A. and recovery had for the damage to part of the land. He cannot afterwards recover for injury done to another portion.<sup>4</sup>

<sup>1</sup> *Badger v. Titcomb*, 15 Pick. 409.

<sup>2</sup> *Fay v. Guynon*, 131 Mass. 31.

<sup>3</sup> *Parker v. Russell*, 133 Mass. 74.

<sup>4</sup> *Wichita & W. R. R. Co. v. Beebe*, 39 Kas. 465.

(e) F. sues for a battery, shows a previous recovery for it of £11, and seeks to recover further, on the ground that afterwards, by reason of the battery, part of his skull came out. The former recovery is a bar.<sup>1</sup>

(f) The action is by the owner of land upon the surface against the lessee of coal seams below, for injury arising from a subsidence. The cause of action is the damage, and not the excavation, which the lessee had the right to make; the plaintiff may recover for every fresh injury.<sup>2</sup>

(g) The action is for personal injury. Recovery may be had for future pain and suffering, if it is reasonably certain that such damages will necessarily result.<sup>3</sup>

(h) The cause of action is a nuisance, a continuing tort (giving rise to a new cause of action from day to day, and which may be abated, enjoined, or discontinued by the person who has established it); damages cannot be recovered after the date of the writ.<sup>4</sup>

(i) The action is by a reversioner for a nuisance, causing damage to the reversion. Evidence of the permanent diminution in the saleable value of the premises is not admissible.<sup>5</sup>

## II.

Where property or contracts are concerned, the question arises how far the right to recover is limited by the extent of the plaintiff's title or interest. In contracts the question presents little difficulty, for as a rule, in this class of actions the only person who can sue for a breach, is entitled to recover the whole damages, no matter what claims others may have against him growing out of the contract. The right to sue upon the contract may pass from one to

<sup>1</sup> *Fetter v. Beal*, 1 *Ld. Raym.* 339, 692, because the probable consequences must be considered to have been taken into account.

<sup>2</sup> *Darley Main Colliery Co. v. Mitchell*, 11 *App. Cas.* 127.

<sup>3</sup> *Curtis v. Rochester & S. R. R. Co.*, 18 *N. Y.* 534; *Strohm v. N. Y. L. E. & W. R. R. Co.*, 96 *N. Y.* 305.

<sup>4</sup> *Schlitz Brewing Co. v. Compton*, 142 *Ill.* 511.

<sup>5</sup> *Battishill v. Reed*, 18 *C. B.* 696.

another, but it cannot, like ownership, be carved into estates or interests.

With regard to land, a life interest may be in one person, the reversion in another, an estate for years in a third, who is in possession; while there may be a mortgage upon it held by a fourth. All are estates recognized by the law, but differ in extent and character. In case of injury, each one may suffer in a different way, or the whole loss may fall upon one or more, while the others escape all but that nominal injury which the law implies in every case of the infringement of a right of this sort. The rule can only be stated in a very general form: —

#### RULE.

26. *When two or more persons have different interests or estates in real property, the damages to which each is entitled are measured by the injury to his own interest.*

#### ILLUSTRATIONS.

(a) The owner of land conveys to a trustee for the benefit of his wife and son, but remains in possession. Both he and the trustee have a right of action for a trespass; but if he has a mere naked possession he can recover only nominal damages.<sup>1</sup>

(b) A lessee for years, at an annual rent, has by the terms of the lease a right to dig half an acre of brick earth annually. He covenants also that he will dig no more, or, that if he does, he will pay an increased rent per half acre. A trespasser takes brick earth to the value of £550. The lessee recovers the full value, the reversioner having, by the terms of the lease, parted with the whole beneficial interest, and the lessee being liable, after satisfaction of judgment, as if he had dug the clay himself.<sup>2</sup>

<sup>1</sup> *Salisbury v. Western N. Car. R. R. Co.*, 98 N. C. 465; acc. *Brown v. Bowen*, 30 N. Y. 519.

<sup>2</sup> *Attersoll v. Stevens*, 1 Taunt. 183.

(c) The injury is caused by flowing lands in the possession of a tenant for years. He is entitled to such damages as will compensate him for the loss of the use of the lands and their yearly products, but not for any permanent injury.<sup>1</sup>

(d) The tenancy is for life. The tenant's damages are measured by taking the present value of the rents and profits, multiplied by the probable number of years of his life, less the probable amount of taxes, repairs, and insurance, and a rebate of interest.<sup>2</sup>

(e) The life-tenant commits waste by selling trees to A. to be severed from the land. The reversioner may recover the damage done to the inheritance.<sup>3</sup>

With regard to personal property, the common-law has an entirely different rule, — that possession gives the right to recover full damages against a stranger, the possessor being of course responsible to the owner for whatever he recovers above his own interest.

But this only applies as against strangers. If the dispute is between the owner of the property and one having a limited interest, the latter can only recover the value of his interest. Any other rule would be productive of needless litigation. If a pledgee, for instance, were to recover for a trespass by the owner the full value of the property, the owner would immediately have a right of action for the full value, less the value of the special interest. And so, too, the general owner can recover against one having a limited interest, only to the extent of the difference between the two.

Where the possessor is not answerable over, and has no interest in the property, although he may have a right of action, on the question of damages his position is different. He cannot recover more than nominal damages.

<sup>1</sup> *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

<sup>2</sup> *Greer v. New York*, 1 Abb. Pr. n. s. 206.

<sup>3</sup> *Dorsey v. Moore*, 100 N. C. 41.

## RULES.

27. *Possession of personal property always gives a right to nominal damages against a stranger.*
28. *If the possessor is responsible over to the owner, he is entitled to full damages.*
29. *As between the owner and one having a limited interest, either recovers to the extent of his own interest.*

## ILLUSTRATIONS.

(a) A chimney-sweep finds an ornament, and carries it to a goldsmith, whose apprentice abstracts the stones. In trover the sweep is entitled to the full value of the ornament.<sup>1</sup>

(b) A sheriff unlawfully seizes goods pledged to the plaintiff, for a sum less than their value. He may recover the full value.<sup>2</sup>

(c) The owner of a horse delivers it to an auctioneer for sale, with liberty to use it, until sold. Through the negligence of a railway company, the horse, while being driven by the bailee in his own carriage, is injured. The auctioneer is not responsible to the owner, and in an action against the railway company can recover for injury to his carriage, but not to the horse.<sup>3</sup>

(d) The case is trover for a wagon by the owner, the defendant having a lien on it for \$14 as balance of the purchase price. In case of a verdict for the plaintiff, the jury must deduct this sum from the value of the wagon.<sup>4</sup>

(e) A sheriff attaches property owned in common, on process against M., who owns an undivided third. In a suit between the other owners and the sheriff on a replevin bond for damages incurred by him owing to their having replevied the property from him, his damages are limited to the value of a one-third interest.<sup>5</sup>

<sup>1</sup> *Armory v. Delamirie*, 1 Stra. 505.

<sup>2</sup> *Lyle v. Barker*, 5 Binney, 457.

<sup>3</sup> *Claridge v. So. Staffordshire Tramway Co.* (1892), 1 Q. B. 422.

<sup>4</sup> *Fowler v. Gilman*, 13 Met. 267.

<sup>5</sup> *Bartlett v. Kidder*, 14 Gray, 449.

## III.

It is a fundamental principle of law that a wrong-doer is debarred from reducing the plaintiff's claim against him by showing that the latter's loss has been lessened through benefit conferred by some third person. The benefit is either the result of a contract made with the third person, based upon a consideration which entitles the party to the full benefit of it, or else it is a gift. The case is the same with a benefit conferred by the defendant. Even an offer of reparation is of no avail, unless it is accepted. The wrongful act makes the right to damages absolute, except with the assent of the party injured.

A different case arises when the act which inflicts the damage also confers a benefit. In such a case, it is usually impossible to separate the two, and see what the damage would be if no benefit had been incurred. The total loss inflicted, whatever it may be, for which alone the claim for damages exists, will be so much less on account of the benefit.

## RULE.

30. *Damages cannot be reduced by proof of benefits or reparation, unless (a) the cause of action, in inflicting the injury, also confers a benefit itself actually affecting a reduction, or unless (b) there is acceptance by the person injured, or unless (c) the benefit enuring to the advantage of the person injured by operation of law, or its own nature, reduces his actual loss.*

## ILLUSTRATIONS.

(a) In an action against a sheriff for wrongful seizure of goods, it appears that goods have been destroyed by fire, and that the owner has been paid in full for the loss by an insur-

ance company. This does not affect his right to a verdict for the full value against the sheriff.<sup>1</sup>

(b) In an action for personal injury, it appears that the plaintiff has received charitable aid. This cannot affect his recovery.<sup>2</sup>

(c) In an action of slander, by a silk manufacturer against a physician, for saying that silk furnished by the former contained arsenic, one of the heads of damage is the value of time spent in determining whether there was arsenic in the silk, &c. The damages cannot be reduced because a company whose employé he is, tell him that no deduction shall be made from his salary, by reason of lost time.<sup>3</sup>

(d) A city causes M.'s premises to be covered by an embankment of earth, destroying a fence. M. removes most of the earth, and uses it for filling and grading other portions of the close. The damages claimed are : 1. The value of the fence, \$25. 2. The damages caused to the land while covered by the earth, \$40. 3. The expense of removing the earth, \$82.50. The defendant shows that the earth, as used by M., enhanced the value of his land more than the cost of the removal of the earth. M. can recover for the first and second items, but not the third.<sup>4</sup>

(e) An officer wrongfully attaches goods, and the day after tenders them to the owner, who does not take them. The officer cannot show the unaccepted tender in mitigation.<sup>5</sup>

(f) A. cuts timber unlawfully on the land of B., an infant. A. may show in reduction of damages that he has, with the assent of B.'s guardian, applied part of the proceeds to the payment of debts against B.'s estate, but not payment made without such assent.<sup>6</sup>

(g) Goods taken unlawfully by a trespasser are subsequently applied by the trespasser, but by legal process, to satisfy the owner's debt. This reduces the owner's claim by the amount so applied.<sup>7</sup>

<sup>1</sup> *Perrott v. Shearer*, 17 Mich. 48.

<sup>2</sup> *Norristown v. Moyer*, 67 Pa. St. 355.

<sup>3</sup> *Elmer v. Fessenden*, 154 Mass. 427.

<sup>4</sup> *Mayo v. Springfield*, 138 Mass. 70.

<sup>5</sup> *Carpenter v. Dresser*, 72 Me. 377.

<sup>6</sup> *Torry v. Black*, 58 N. Y. 185.

<sup>7</sup> *Hopple v. Higbee*, 3 Zab. (23 N. J. L.) 342.

(h) Supervisors of a town are sued for refusing to put a judgment on the tax list; they may show that subsequently the judgment was placed on the list, and plaintiff can recover only nominal damages.<sup>1</sup>

(i) The action is by one who has been deprived of the possession of real estate, rents, and profits. His claim must be reduced by the improvements, and the expenses necessarily incurred to make it profitable.<sup>2</sup>

(j) In mining coal, W., by mistake, mines and carries away some of F.'s coal, which lies beyond his line. F. brings trover, and claims to recover the value of the coal after it had been mined. W. is chargeable only with the value in place.<sup>3</sup>

(k) In a similar case, the coal is sold by defendant. The jury is charged that the plaintiff's damages are the fair market value of the coal at the time of sale. At the mouth of the shaft the coal was worth \$2.10 per ton, and this the jury allows, without deduction for the cost of getting it there. The plaintiff is entitled to a new trial; the jury should have been told to give the value less the expense; or, the value of the coal when it first became a chattel by being severed from the ground in which it lay.<sup>4</sup>

(l) The action is to recover possession of lumber, manufactured from logs cut without authority under mistake upon plaintiff's land; the jury assess the damages at the full value of the lumber. The expenses of manufacture should have been deducted.<sup>5</sup>

(m) In a similar case, the defendant conveys the logs to market and sells them. The measure of damages is either the value in the market less expenses, or the value of the

<sup>1</sup> Dow v. Humbert, 91 U. S. 294.

<sup>2</sup> Hylton v. Brown, 2 Wash. C. C. 165; Hodgkins v. Price, 141 Mass. 162; but even here the principle that one who is injured cannot have benefits thrust upon him to affect his injury applies; for if the defendant knows of the superior title, he loses his improvements, and he can in no case recover a balance against the owner.

<sup>3</sup> Forsyth v. Wells, 41 Pa. St. 291.

<sup>4</sup> McLean County Coal Co. v. Long, 81 Ill. 359.

<sup>5</sup> Single v. Schneider, 24 Wis. 299.

property when first severed, together with any profits in the ordinary market.<sup>1</sup>

(n) W. cuts trees on M.'s land, divides them into logs, and conveys the logs to another spot, where they are of greater value by the amount of the labor involved. The measure of damages is the value of the logs when they first became personal property.<sup>2</sup>

<sup>1</sup> *Winchester v. Craig*, 33 Mich. 205; the fundamental rule seems to be the value of the property in place. Even if it costs more than this to get it to market, the plaintiff would be entitled to the value. *Ibid.*

<sup>2</sup> *Moody v. Whitney*, 38 Me. 174.

## CHAPTER X.

### VALUE AND PRICE.

THE elements of injury in a given case being ascertained, it remains to determine how these are to be computed in money. When the sole element of injury is that implied in the right of action itself, there is no difficulty. A trifling sum, the amount being established by custom or statute, is given, and costs go with it. When the elements of injury are strictly non-pecuniary, the amount is in the discretion of the jury, subject to review by the court, if the amount of the verdict seems to it plainly excessive or inadequate in the light of the evidence. If the elements are pecuniary, that is, if they are of such a material description that money is the necessary measure to be applied to them, various questions may arise. These will be found to be mainly questions of value and price. Whenever property is destroyed or injured, the measure of damages involves an inquiry into its value, either its value in the market, or for some purpose; whenever a contract of sale is broken, the contract price is one of the factors to be considered. The reason why the market is usually taken as the measure of value is sometimes said to be that this is what the person entitled to the article would have to pay to replace himself.<sup>1</sup> On the other hand, it is said that this is what he could have sold it for. Sometimes both reasons are suggested.<sup>2</sup>

The first reason will, no doubt, explain most of the cases,

<sup>1</sup> *Smith v. Griffith*, 3 Hill, 333-337.

<sup>2</sup> *Blydenburgh v. Welsh*, Bald. 331.

because when a thing is bought, and not delivered, or lost or destroyed, if it is replaced by the amount of money which will enable the purchaser or owner to obtain another of the same kind, he is compensated. But it will not apply to cases when there is no market, nor where, if there is a market, there is nothing of the same kind to be procured in it. The second reason is objectionable, because, though the market price is what the article could have been sold for, sale is not necessarily the object of the owner.

[The real reason and the one which harmonizes all the decisions is believed to be that where through a wrongful act the value of anything is destroyed or diminished, the person injured is entitled immediately to an amount of money representing *the value for all lawful purposes*; that as one lawful purpose is the enjoyment and use of the article, he is entitled to such a sum as would have bought another similar article in the market; that as another lawful purpose is the sale of the article, he is entitled to such a sum as he could have sold it for in the market.] As enjoyment or sale are ordinarily the only possible objects in view, the market is the usual test. It is the best evidence of value. And this test must, in the nature of things, be generally adhered to, for though it is true that the market is merely the evidence of value, and not value itself,<sup>1</sup> still it is usually the only reliable evidence we have, and if we abandon it, we are soon lost in speculation and conjecture.

The attempt has been made to show that in some cases the market value is not the true rule, and that there is a sort of intrinsic value, not dependent upon the market, which ought to be inquired into. In a dissenting opinion in *Smith v. Griffith*, an action against carriers for loss of goods,<sup>2</sup> COWEN, J., insisted that while the rule in an action

<sup>1</sup> *Kountz v. Kirkpatrick*, 72 Pa. St. 376.

<sup>2</sup> 3 Hill, 333.

for goods sold at an agreed price was the price, here the question was how much the goods lost were worth, and that the defendants should have been allowed to prove that the goods had no intrinsic value, and that the market value was fictitious; but the majority of the court followed the usual rule. And the case seems to illustrate perfectly, both the use of the market value as evidence, and the danger of departing from it when it is accessible. The articles injured were Alpine mulberry-trees, and the defendants proposed to prove that subsequent to the injury, it had been ascertained that such trees were of trifling value as compared with the market price; that they were purchased to plant as a nursery, from which to sell for production; that they were of no value next year, and would not have paid the expense of cultivation. The majority of the court held the evidence inadmissible because: 1. it related to a time subsequent to the injury, while the plaintiff was entitled to their full value at that time; 2. that the plaintiff's intention to plant for production, was irrelevant, as it bound nobody, and the plaintiff might have turned the trees to better account. [In other words, the value was what the trees were worth for all lawful purposes, and the best evidence of it was the market value.]

But cases continually occur in which it will not apply, and then other evidence must be resorted to. What this evidence shall be must depend upon the nature of the case, and does not in any way affect the measure of damages, which is always the value of what has been lost. [One of the commonest tests of value is the cost of production.]

The rule of value has necessarily no application to cases of infringement of rights purely personal, such as liberty, or security. For these the damages cannot be measured by rule; but elsewhere it is universally in force. For

instance, it applies to all contracts, and in such cases whether we hear only of the "value of the contract" (the general measure of damages), or of the market value of a thing, depends on the nature of the agreement. In case of sales the market value of the thing sold is usually the best test; in other cases it is not. Occasionally a combination of circumstances occurs in which the existence of any value may be doubtful.

{One of the commonest cases of value, is the value of the use of a thing, *e. g.* the rent of a house, the charter of a boat, the interest of money.} A recovery of the value of the use generally implies that the title to the property remains in the plaintiff; when the act complained of has destroyed the property, the owner's claim is usually limited to the value, assessed in money at the time of the loss, [and any further loss by delayed payment is compensated by interest on this sum.] If he were to recover besides the value of the property and the interest, the value of the use also, he would be twice compensated for the same loss.

Price is not value, but a matter of evidence bearing on value. For example, the amount of money paid on a purchase of personal property is the price of the article, but it may be quite different from the value. Usually, when there are regular market sales, the market price and market value will correspond; but a price may be asked or obtained which is lower or higher than the value.<sup>1</sup>

#### RULE.

31. *For loss of property, property rights, or rights resting in contract, the measure of damages is the value of the property or rights.*

<sup>1</sup> Kountz v. Kirkpatrick, 72 Pa. St. 376; Cary v. Gruman, 4 Hill, 625.

## ILLUSTRATIONS.

(a) In an action for non-delivery of oil sold, plaintiff offers to prove that at about the time of the delivery the principal oil-dealers made a combination to create an artificial scarcity and an unnatural price. The offer is rejected. On writ of error, plaintiff is entitled to a new trial.<sup>1</sup>

(b) The cause of action is breach of contract for the delivery of coal at G., a point on the Mississippi, where there is no market for the purchase of coal except that of the defendant company, which controls the business. The plaintiff cannot show the prices at all points on the river; but is confined to the nearest available market. The value of the contract which he has lost is measured by the difference between such price and the contract price.<sup>2</sup>

(c) F. buys champagne at 14s. per dozen, and resells it at 24s., but is prevented from delivering by defendants' converting it. Champagne of a similar quality is not procurable in the market. The value of the champagne, for which defendants must answer, is 24s. per dozen.<sup>3</sup>

(d) Goods delivered to a carrier for transportation to N. are lost; there is no market for such goods there. The value is calculated by adding to cost price and expenses a reasonable profit.<sup>4</sup>

(e) P. is owner of an island in the Mississippi, which is taken by a boom company by authority of law. He is entitled to its value for all purposes for which it is suitable, including its adaptability for the purpose of a boom.<sup>5</sup>

(f) The action is trover for converting stereotype plates, made for the printing of labels or advertisements in the plaintiffs' names, to be used by them only, and of very trifling

<sup>1</sup> *Kountz v. Citizens' Oil R. Co.*, 72 Pa. St. 392; *Kountz v. Kirkpatrick*, id. 376.

<sup>2</sup> *Grand Tower Co. v. Phillips*, 23 Wall. 471.

<sup>3</sup> *France v. Gaudet*, L. R. 6 Q. B. 199.

<sup>4</sup> *O'Hanlan v. Gt. Western Ry.*, 6 B. & S. 484.

<sup>5</sup> *Boom Co. v. Patterson*, 98 U. S. 403.

value except to them. Evidence of the cost of replacing the plates is admissible.<sup>1</sup>

(g) The action is for killing a race horse, in transit across the Isthmus of Panama. There is no market price for such a horse on the isthmus. As bearing on the value at the place of loss, the market value at San Francisco, the place of destination, may be shown.<sup>2</sup>

(h) The action is to recover the value of a portmanteau and contents, consisting of clothing. The plaintiff can recover not merely what the clothing would sell for, but the value of it for use by the owner.<sup>3</sup>

(i) The action is for the conversion of a schooner lying on the shore, in Massachusetts, at a place where there is no market. Evidence of the market value at St. John, Boston, or other ports may be received, as well as of the probable expense of getting her to market, of the diminution in her value through having gone ashore, of the rate of insurance, and perhaps of a fair salvage; but the measure of damages is her value, or what buyers would pay for her, as she lies on the beach, with all the facts known.<sup>4</sup>

(j) The action is to recover the value of an oil-painting, the portrait of the plaintiff's father, for which there is no market value. Evidence of its cost, the practicability and expense of replacing it, and of the fact that the owner has no other, is admissible.<sup>5</sup>

(k) The plaintiff is entitled to recover from the defendant damages for the detention of machines furnished by him for trial, and the value of the machines. There is no market value, as to the machines, or their use. He is entitled to the cost of production with interest.<sup>6</sup>

(l) E., an architect, desiring to enter into a competition for

<sup>1</sup> *Stickney v. Allen*, 10 Gray, 352.

<sup>2</sup> *Harris v. Panama R. R.*, 58 N. Y. 660. This is not the measure of damages, however, for deduction must be made for risk and expense of transportation. *Ib.*

<sup>3</sup> *Fairfax v. New York Central and Hudson R. R. R.*, 73 N. Y. 167.

<sup>4</sup> *Glaspy v. Cabot*, 135 Mass. 435.

<sup>5</sup> *Green v. Boston & Lowell R. R.*, 128 Mass. 221.

<sup>6</sup> *Redmond v. American Mfg. Co.*, 121 N. Y. 415.

the construction of a public building, prepares plans and forwards them to the committee by carrier. In consequence of defendants' negligence, the plans do not arrive in time. The evidence is that the plans were totally unfitted for the purpose, that E. could not have succeeded in the competition. The measure of damages is the value of the loss of the opportunity to compete, and this being nothing, the plaintiff can only recover nominal damages.<sup>1</sup>

(m) G. sues C. for breach of warranty of soundness on the sale of a horse. The jury is charged that the measure of damages is the difference between the price paid, and the value of the animal with the defects. There must be a new trial. The measure of damages is the difference between the real value, and the value with the defects.<sup>2</sup>

(n) A picture is exhibited, which is a scandalous libel upon a gentleman and his wife. The latter's brother cuts it in pieces. In a suit by the painter against the brother, some of the witnesses estimate the value at several hundred pounds. The jury can only assess the value of the canvas and paint, as a libel in law has no value, and the exhibition might have been enjoined.<sup>3</sup>

<sup>1</sup> *Adams Express Co. v. Egbert*, 36 Pa. St. 360.

<sup>2</sup> *Cary v. Gruman*, 4 Hill, 625.

<sup>3</sup> *Du Bost v. Beresford*, 2 Camp. 511.

## CHAPTER XI.

### INTEREST.

It is difficult to lay down general rules for the allowance of interest as damages, partly because the law both in England and America has within the last century changed very much, and partly because it is even now different in different jurisdictions.

In order to understand the course of decision, it is necessary to notice that it is only in very recent times that the subject has been placed upon its true foundations. The ordinary common-law action for non-payment of money was *assumpsit*; that is, it was founded upon the idea of a promise, express or implied. Consequently, it seems to have been thought at one time that when the action was of this nature it was a proceeding for specific performance, *i. e.* to *compel* the *performance* of the promise supposed to have been made by the defendant. Thus Lord Mansfield speaks of the action as "brought to obtain a specific performance,"<sup>1</sup> and Lord Loughborough<sup>2</sup> goes so far as to say that it is "a technical fiction to call the sum recovered 'damages.'" It followed from this view, that the solution of the question of interest involved the question whether the promise, express or implied, covered, in fact or in law, an undertaking to pay interest. In the case of a bill or note, expressly carrying interest, there could be no hesitation; when such an instrument was payable at a fixed time, it was not difficult to hold that interest must be given. But where there was no promise to pay it, express

<sup>1</sup> Robinson v. Bland, 2 Burr. 1077.

<sup>2</sup> In Rudder v. Price, 1 H. Bl. 547, 554.

or implied, to sustain an action of *assumpsit* seemed out of the question.

The common-law rule as early laid down in England restricted interest to mercantile securities payable at a fixed time, to cases of an express promise to pay it, and to cases where the law from the circumstances of the case, from the usage of trade or the parties, etc., implied it.<sup>1</sup>

The rule was found too narrow, and by Statute 3 & 4 Will. IV. 11, the jury are allowed in their discretion to give interest on debts and sums certain from the time of payment (if payable in writing at a time certain), if otherwise, then from time of demand in writing; also, in cases of trover, trespass *de bonis asportatis*, and policies of insurance; and the common-law rule, so enlarged, is the law of England on the subject to-day. In the United States, the development of the law of interest has been mainly effected by judicial decision.

Traces of the early theory that to recover interest there must be a promise to pay it, may be observed at a much later date. Thus, in 1830, Putnam, J., in delivering the opinion of the court in the case of *Dodge v. Perkins*,<sup>2</sup> an action on an implied *assumpsit*, there being a mere legal liability to pay, declares that "If the interest is not *included in the contract*, it cannot be given. If it is included, then it should make up a part of the judgment." But as the principal promise was implied, it is perfectly clear that the subsidiary promise was implied also, and so the opinion proceeds, "whether there has been an implied promise to pay interest often depends upon *the usages of trade and dealings between the parties and other circumstances*, which explain the duty undertaken to be performed."<sup>3</sup>

<sup>1</sup> *Gordon v. Swan*, 12 East, 419; *Calton v. Bragg*, 15 id. 223; *Walker v. Constable*, 1 B. & P. 306; *Carr v. Edwards*, 3 Stark. 132; *Nichol v. Thompson*, 1 Camp. 52 n.

<sup>2</sup> 9 Pick. 368, 384.

<sup>3</sup> Id. 385.

Notwithstanding the high authority of the source from which this theory comes, a more searching analysis of the subject has led to its general abandonment, and it is now held that an action for non-payment of money, whether founded upon a promise, express or implied in law, is an action for the breach of the promise, that the redress given is not specific performance, but damages; and the interest allowed is further damages for the *value of the use* of the money while detained. Its legal character is therefore closely analogous to that of the rent of land, or the hire of a chattel, considered as damages.

What has been said with regard to the interest on money demanded will make clearer the principle which has been making its way in the allowance of interest in all other cases. The principle is, that wherever a claim for damages exists, no matter what the cause of action, if it represents a loss of a pecuniary value ascertainable with reasonable certainty, as of a definite time, interest should be recoverable from that time. If the claim is at large and for the discretion of the jury; if it is unliquidated, and involves non-pecuniary elements, such as pain and suffering, it should not be allowed. In many cases of the first class interest recoverable in one jurisdiction as a matter of law, is in another in the discretion of the jury.

1. In actions, where the primary injury falls in whole or in part upon rights purely personal, such as assault, assault and battery, personal injury through negligence, libel, slander, false imprisonment, seduction and breach of promise, the jury has a right to take into account all the circumstances, and a wide discretion as to amount. It may therefore perfectly well allow for the time which has elapsed since the injury. But interest cannot be given as a matter of law; if the jury were in addition to their discretionary powers to be directed to allow interest as a matter of law, the result must often be a double allowance of

interest. In such cases as these the damages include suffering, past and prospective.<sup>1</sup> And there are no means of calculating arithmetically the value of probable future suffering. When exemplary damages are allowed, interest in addition would be a manifest absurdity.

2. In other cases of tort, where rights of property, or money's worth, only are involved, there is every reason why, if a loss is fixed at a definite time, the plaintiff should be allowed, as of right, interest on the money representing it from that time. It is often said that since the amount may not have been ascertainable till verdict, it was not a debt; the plaintiff could not demand it, and the defendant could not pay it. This is perfectly true, but wholly irrelevant. The question is what has the plaintiff lost, and since his loss includes not only the rights destroyed or injured, but the value of their use, from the time of the loss, unless he obtains interest as an equivalent he is not remunerated. The essence of the plaintiff's claim is in the loss, not in the fact that the claim takes through the medium of a verdict a pecuniary form. It may be a more correct use of language to say that the plaintiff recovers damages for the loss of the use, and that interest does not begin to run till after judgment; but since interest is the form which in these cases the loss of the use always takes, the result will be the same—that the plaintiff should recover as a matter of right in addition to the sum of money representing the thing or rights which he has lost, a sum equal to the legal interest upon it.

But this is not by any means universally the law; the control of the jury still clings to interest in many jurisdictions where, in determining the measure of damages as to the principal loss, the control of the court has become supreme. And in the same jurisdiction interest may be recoverable as a matter of law in trover, while if the action

<sup>1</sup> *Railroad v. Wallace*, 91 Tenn. 35.

is for negligent injury, the jury decide the question. All that can be said is that it is either recoverable as of right or allowable in the discretion of the jury.

3. Looking at cases of contract and tort together, two opposing theories run through the decisions, one that a demand must be liquidated before interest upon it can be allowed as a matter of law; the other that when there has been an injury, involving solely pecuniary elements ascertainable by verdict as of a given date, the claim is substituted, in the view of the law, for the rights taken or injured, the property destroyed, the advantage of the contract lost, and when the amount is ascertained by legal decision, the plaintiff is just as much entitled to interest upon it from the time of the injury, as he would have been to the subsisting enjoyment of the advantage, the property, or the rights.

This second theory, which is in fact the principle just suggested as the true one, is superior to the first in the fact that there is no real line of division between liquidated and unliquidated demands; (indeed, properly speaking, if a claim for damages is disputed, it cannot be said to be liquidated until a verdict has been rendered,) and also that it is in complete harmony with the principles on which the whole law of damages rests.

This can readily be seen by considering the analogous case where damages are given for the detention of an article, where they are measured by the value of its use. In this case the article is not permanently lost to the owner. He recovers the property. But he has been deprived of its use, and the value of this he recovers. So, if he is kept out of money, the rule is, that he recovers not the identical money in question, but an equivalent sum as damages, with interest as the value of the use.

It follows from this, that where only pecuniary injury is involved and there is a definite time, as an initial point for

the allowance of interest, which may be according to circumstances that of action brought, of conversion, demand, adjustment of claim, destruction of property, etc., there is no room for the discretion of a jury.

If this theory were completely developed, the only question of difficulty presented would be that in some cases, the time from which the interest must run would not be easy to determine. In cases where the time is fixed by the contract, or by a demand for payment, or for the return of goods, there could be no question; in the case of a continuing contract, as a warranty, or an agreement for support, or a tort with continuing consequences, the determining fact would be the *time of the injury*. It may be thought that where the damages are prospective, a difficulty would arise, as in the case of prospective suffering above mentioned. But such is not the case, if the injury is pecuniary. For instance, in the case of a contract to support, the measure of damages would be based on the present worth of the support. The present worth of future injury is of course the converse of pecuniary redress for a past injury with interest added.

The opposing theory appears to rest on the idea that interest should not be allowed unless the claim is of such a nature that the defendant might have settled it by payment without suit, and that he ought to have done so either immediately upon being sued, or at some previous time, as upon demand. The history of the matter in the New York courts shows a tendency, first, in the direction of one theory, then in that of the other. A review of the history of the cases in that State is given in Earl, J., in the opinion of the Court of Appeals, in *White v. Miller*.<sup>1</sup> In New York the allowance of interest was first extended beyond the limits of the common-law rule to actions to recover money wrongfully detained; then to actions for the detention, taking, or conversion of property, for goods

<sup>1</sup> 78 N. Y. 393.

sold, and for work and labor. Finally a still further extension took in all actions in which, though the demand was unliquidated, the amount could be ascertained by computation alone, or computation in connection with established market values. But in *White v. Miller*<sup>1</sup> the Court of Appeals, in a case where this rule could not be applied, laid down another, and quite different one, that where the claim sounds wholly in damages, is unliquidated, and contested, and the amount is entirely uncertain, interest can be allowed neither from the time of a demand, nor from the date of the action. This case was followed in *McMaster v. The State*.<sup>2</sup> Certainly, if a demand will not set interest running, a writ will not, and there are many cases where a demand either for payment, or, as in trover, for a return of property taken, is necessary to the maintenance of an action. But if a right of action exists, and a pecuniary injury has been inflicted, which the verdict measures and ascertains, and if redress is to be commensurate with the injury, the date of the injury—that is, the date at which the law considers the injury to have arisen, whether on demand or independent of it—should be the starting point of the redress. For example, interest is excluded in all cases on the items of an account, where supplies are furnished, if it is not the intention or the usual course of dealing to charge interest. The domestic supplies furnished by tradesmen on an open credit furnish a common instance. But here the creditor may, by notice or demand, fix the debtor with liability for interest, and if he brings suit the date of the writ will fix the time of demand from which interest runs.

A question as to interest which has divided the courts is that with reference to overdue paper. When a bill, note, or other security carries interest at a stipulated rate, at what rate is interest to be calculated after the paper has

<sup>1</sup> *Ubi supra*.

<sup>2</sup> 108 N. Y. 542.

become due, and the contract has been broken? The rate must be either that provided by the contract, or the rate provided for by the statute determining the rate in the absence of contract. Inasmuch as the contract is broken, and the plaintiff can recover only damages, many courts of the highest authority hold that the statutory rate governs. Others, of equal authority, think that the contract rate ought to prevail. The weight of reasoning seems to be in favor of the statute rate, and it may be suggested that the opposing argument is historically connected with the early theory, already noticed, that the right to interest for breach of a promise to pay money must be rested upon the promise itself. As a matter of fact, the two are now generally regarded as entirely disconnected.<sup>1</sup>

The source of the theory which makes the contract rate govern may probably be seen in the Massachusetts decisions. In *Dodge v. Perkins*,<sup>2</sup> in 1830, Putnam, J., says: — “If the interest is not included in the contract, it cannot be given.” In 1873, the same court, in the case of a note at ten per cent., deciding that this rate prevails after maturity, says: “The plaintiff recovers interest, both before and after the note matures, by virtue of the contract.”<sup>3</sup>

If the defendant is not chargeable with delay interest will not run against him. The commonest instance is tender of the amount due; if an amount greater than is afterwards found to be due by the jury is tendered, the result is the same.<sup>4</sup> The same thing is true if any legal impediment intervenes, as in the case of war between the countries which are the domicile of the debtor and creditor,

<sup>1</sup> Cf. *Cook v. Fowler*, L. R., 7 H. L. 27; *In re Roberts*, 14 Ch. D. 49; *Holden v. Trust Co.*, 100 U. S. 72; *Eaton v. Boissonnault*, 67 Me. 540; *Paine v. Caswell*, 68 id. 80; with *Cecil v. Hicks*, 29 Gratt. 1; *Union Inst. for Savings v. Boston*, 129 Mass. 82.

<sup>2</sup> 9 Pick. 368, 384.

<sup>3</sup> *Brannon v. Hursell*, 112 Mass. 63, 71.

<sup>4</sup> *Thompson v. Boston & Me. R. R. Co.*, 58 N. H. 524.

or in the case of trustee process, foreign attachment or injunction.

Compound interest, or interest on interest, as damages, is not generally allowed. It has been suggested that this rule has its foundation in the fact that where interest is payable at fixed dates a right of action immediately accrues, and if no suit is brought for it, it is more in accordance with the ordinary practice of affairs to hold that the right to it has been waived; but it is more easy to state the rule than to reconcile the reason given with general principles of law. Probably a very ancient custom is the source of the rule. Exceptional circumstances may permit the allowance of compound interest, *e. g.*, when the intention of the contract calls for it.

#### RULES.

32. *Damages include interest, as of right on all contracts expressly providing for it, where it is implied from usage, or the dealing of the parties, in all actions for non-payment of money only, and on all liquidated demands.*
33. *Interest is not recoverable in cases of tort involving injuries non-pecuniary.*
34. *In all other cases of tort, involving pecuniary injury only, where the loss is fixed as of a definite date, interest is either (a) a matter of right, or (b) it is allowable in the discretion of the jury.*
35. *Whenever the defendant is not legally chargeable with delay, interest will not run against him.*
36. *Interest is not recoverable on arrears of interest.*
37. *Interest on damages is at the rate established by statute.*
38. *Interest runs on all judgments.*

## ILLUSTRATIONS.

(a) The yearly rent reserved in a lease is eighteen bushels of wheat, four fat hens, and one day's service with carriage and horses. In an action for breach of covenant to pay rent, interest is recoverable from the time when the rent became due, on the market value of the wheat, hens and services.<sup>1</sup>

(b) The action is on a contract of sale for non-delivery of personal property, the measure of damages being the difference between the contract and market price. The vendee is entitled to interest.<sup>2</sup>

(c) Under a contract for the construction of a railroad, the payments depend upon estimates, and measurements to be made by the engineers of the company. The company refuses to have a final measurement made, or measurements already made reviewed. The amount due is not liquidated, nor capable of being ascertained by calculation merely, nor by reference to market rates; but the defendant is in default for not having taken the requisite steps to ascertain the amount of his debt. Interest is recoverable from the time of the refusal of the company.<sup>3</sup>

(d) The action is to recover damages for breach of warranty in the sale of seed. The measure of damages is the difference between the value of the crop raised, and such a crop as would have been raised, had the seed corresponded with the warranty, and the claim is therefore unliquidated, and so uncertain that a demand would not have set the interest running. Interest is not recoverable.<sup>4</sup>

<sup>1</sup> Van Rensselaer v. Jewett, 2 Comst. 135.

<sup>2</sup> Dana v. Fiedler, 12 N. Y. 40.

<sup>3</sup> McMahon v. N. Y. & Erie R. R. Co., 20 N. Y. 463.

<sup>4</sup> White v. Miller, 78 N. Y. 393. Undoubtedly neither party could know in advance what the precise amount of the claim would turn out to be; but this does not alter the fact that the plaintiff has lost the expected benefit of his contract, and that unless interest is given the loss increases with every day. If it be objected that the time of such an injury cannot be ascertained, that is an objection to any recovery whatever; a time must be fixed for taking the difference in value.

(e) P. has received money belonging to D., and is liable for it without demand. He is also liable for interest.<sup>1</sup>

(f) In an action against a railroad for personal injury W. recovers a verdict, assessing the damages at \$7,000, with seven years interest, \$2,940. Unless he remits the interest, the defendant is entitled to a new trial.<sup>2</sup>

(g) Land is taken by right of eminent domain. The owner is entitled to interest on the value from the time when the owner's right to use the land ceases.<sup>3</sup>

(h) The action is trover for the value of a barge converted by defendants. The jury is directed to allow interest on this value. The direction is proper.<sup>4</sup>

(i) The action is for the value of personal property destroyed by the negligent act of the defendant. Interest is allowable as damages.<sup>5</sup>

(j) The cause of action is for destruction of property through negligence. On the trial the judge directs the jury to allow interest as a matter of law. This is error. It should have been left to the jury, in their discretion, to allow damages in the nature of interest, for the lapse of time.<sup>6</sup>

(k) The cause of action is the same. The case is referred to an auditor, who having the powers of a jury, allows interest. On appeal it is held that the jury has the power to consider the delay caused by the defendant, and that it cannot be better done than by taking interest on the original damage as a measure.<sup>7</sup>

<sup>1</sup> *Dodge v. Perkins*, 9 Pick. 368.

<sup>2</sup> *Railroad v. Wallace*, 91 Tenn. 35.

<sup>3</sup> *Old Colony R. R. Co. v. Miller*, 125 Mass. 1; *South Park Com'rs v. Dunlevy*, 91 Ill. 49.

<sup>4</sup> *Andrews v. Durant*, 18 N. Y. 496.

<sup>5</sup> *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361.

<sup>6</sup> *Richards v. Citizens' Natural Gas Co.*, 130 Pa. St. 37.

<sup>7</sup> *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126. This necessarily raises the question as to who caused the delay. In the Massachusetts case, the defendants denied their liability, and the plaintiff waited for the decision in another case — a prudent course. But any person injured by another has the period of the Statute of Limitations within which to bring his action, and he cannot be properly chargeable with delay if he brings it within that period. A court of justice could

(l) A. brings suit against B., on an account annexed for \$25.00. Prior to this a trustee process had been begun by C. and A., making B. the trustee. B., as trustee, having paid \$25.00 on the execution, cannot be charged with interest in A.'s suit against him.<sup>1</sup>

(m) The action is replevin for the loss of a savings bank book; the deposit draws interest at three per cent. The rate for purposes of damages is seven, this being the statutory rate in all cases.<sup>2</sup>

(n) The action is on a promise to pay the annual interest of certain notes, in case the makers do not pay. Only simple interest can be recovered.<sup>3</sup>

(o) The action is on a coupon for interest, attached to a bond, but detachable therefrom, and intended to have all the qualities of commercial paper. Interest is recoverable from the date of payment.<sup>4</sup>

(p) The action is debt upon a judgment rendered by a justice of the peace. The demand is a liquidated one, and the plaintiff is entitled to interest, as of right.<sup>5</sup>

hardly permit an inquiry as to whether the plaintiff might or might not have brought the action earlier. Damages for delay in these cases means indemnity for what the plaintiff has lost by not having the value of the property immediately on its destruction, and this is really interest.

<sup>1</sup> Bickford v. Rich, 105 Mass. 340.

<sup>2</sup> Wegner v. Second Ward Savings Bank, 76 Wis. 242.

<sup>3</sup> Henry v. Flagg, 13 Met. 64.

<sup>4</sup> Aurora City v. West, 7 Wall. 82.

<sup>5</sup> Mahurin v. Bickford, 6 N. H. 567.

## PART II.

### TORT AND CONTRACT.

---

#### CHAPTER XII.

##### DAMAGES IN TORT.

FROM what has been already said it will not be expected that the development of the law in actions of tort can produce many definite rules as to the measure of damages in particular classes of actions. The control or discretion of the jury, the rule that exemplary damages may be given to punish the defendant, the fact that there is no agreement to be interpreted or measured by the court, that in many if not most cases, personal and non-pecuniary injuries are to be redressed, and that evidence is generally admissible in aggravation or mitigation,—all these circumstances contribute to prevent the formation of rules other than such as are very general. The cases turn rather upon the relevancy of the evidence offered to the issues presented by the pleadings, and upon the right to recover for heads of damage which vary with every case.

So far as direct damages are concerned, the name of the action shows very often what the general measure of damages is. Thus it is obvious that in slander or libel the plaintiff must be entitled to recover an amount of damages representing the injury to his reputation; in an

action to recover the possession of personal property, he must be entitled either to the property, or if that is gone, to its value. But very little would be gained by the formulation of these essential rules, because in any actual case the measure of damages becomes enlarged so as to cover all the special circumstances. This is an important distinguishing mark between Tort and Contract. In contract, a rule of damages is appealed to, from which the facts of the case vary more or less, but which always serves as a guide. In tort, while there is a general principle, the facts of the case make the rules for it.

It is true that, with reference to what are heads of damage or matters of aggravation or mitigation in every kind of action, an enormous multitude of rulings upon offers of evidence of one kind or another might be collected, but they could only serve, when arranged and classified, to show that the effort of the law in tort is not in the direction of assuming control of the *measure* of damages, or applying an exact standard, except in one class of cases, — that of torts affecting property or contract rights *only*, *i. e.*, where the rights affected are purely *non-personal*, and where in addition to this the act complained of is indifferent as regards motive.

For it must be noticed that the mere fact that a tort affects property or contract rights is not enough to make the rule of damages a rule of pure law. The case, for instance, is one of trespass upon real property, and the injury the destruction of a fence, at once repaired by the owner. In the absence of all other circumstances the measure of damages may be the cost of repairing the fence. From this rule it might be inferred that in cases of trespass the measure of damages is the cost of repairs. But suppose that the trespass is malicious, accompanied by circumstances of outrage and insult. In some jurisdictions the jury may now give exemplary damages; else-

where the plaintiff will recover for injury to his feelings, — in both cases the damages are at large, and in the discretion of the jury. And even if the trespass is wholly accidental, while the damages will be measured by the cost of repairs, the allowance of interest on the amount will in many jurisdictions be in the discretion of the jury. But the cost of repairs itself is merely an alternative rule. In another case of trespass the plaintiff may be entitled to recover the value of property injured. Except that the compensation must be commensurate with the injury, there is no invariable measure of damages in trespass.

Again, the discretion of the jury is always limited by the requirement that the verdict must be supported by the evidence. In cases of contract this is often a matter of mere arithmetical calculation, as in the amount of interest on a certain sum of money for a certain time. In tort, wherever the jury has any discretion as to the amount, the principle is applied in a different way. If there is a clear discrepancy between the evidence and the verdict, — if the heads of damage will not yield a verdict such as has been given, it is said that the verdict must have been the result of ignorance or of some improper motive acting upon the jury, and it is set aside. In those cases where there is no room for any discretion at all, where there are no circumstances of aggravation, where the injury is entirely non-personal, and where interest is treated as a matter of right, a rule of law at once makes its appearance; but, for reasons already stated, it will cease to be of binding force in a case otherwise precisely similar, but marked by circumstances of aggravation, personal wrong, &c. This is the method by which the court tests the exercise by the jury of its discretion, and measures a verdict to which exception is taken as being too large. In the opposite case of a verdict excepted to as inadequate, the method is precisely the same. It is that it must be

clear that the jury have considered and taken into the account all the heads of damage in respect of which the plaintiff is entitled to compensation. Otherwise it is held that the jury have not taken a reasonable view of the case.<sup>1</sup>

The control of the court over the discretion of the jury is sometimes shown in another way; it cannot, merely because the damages are at large, leave the whole matter to the jury; it *must instruct* them as to the proper measure of damages. An action is brought against a railroad company for wrongful refusal of admission to the train. The jury is told that plaintiff is entitled to such damages as will under all the circumstances compensate him. The verdict cannot stand. "The court must decide and instruct the jury in respect to what elements, and within what limits, damages may be estimated in the particular action."<sup>2</sup>

Courts are more and more averse to laying down the measure of damages in particular cases in the form of an invariable rule, even when precedent warrants it. There is no better illustration of this than the action of trover, the great modern action for the conversion of and trial of title to personal property. It has been laid down in innumerable cases that the measure of damages is the value of the property at the time of the conversion with interest, and it is beyond all doubt that for the misappropriation of a definite chattel at a definite time, this is and always has been a rule of law. But whenever the occasion requires it, judges insist upon its not being an invariable rule. In one case,<sup>3</sup> it is pointed out that the time of the conversion may not be well defined; in another,<sup>4</sup> that "the rule of damages

<sup>1</sup> Phillips v. S. W. Ry. Co., 4 Q. B. D. 406.

<sup>2</sup> B. & O. R. R. Co. v. Carr, 71 Md. 135; Knight v. Egerton, 7 Ex. 407.

<sup>3</sup> Kent, J., in Cortelyou v. Lansing, 2 Cai. Cas. in Error, 200, 216.

<sup>4</sup> Baker v. Drake, 53 N. Y. 211, 220.

should not depend upon the form of its action ;" in a third, it is decided that there is "no fixed, definite measure of damages applicable in all cases of conversion of property."<sup>1</sup>

The right of the parties to give evidence of facts in mitigation or aggravation is closely connected with the common-law system of pleading. Almost all actions for the redress of injuries to the person or property are derived from a common source, the action of trespass, and in the primitive times in which this action was introduced, civil and criminal procedure were not yet discriminated ; mitigation and aggravation are themselves terms which show the early implication of the notion of guilt with that of tort. It is very natural therefore that the earliest general defence to the charge of tort of any kind should have been that now primarily associated in our minds with criminal procedure, — "not guilty," and such has always been what is called the "general issue" (supplanted in many modern systems of reformed procedure by the "general denial"), in primitive actions of tort. Owing to its comprehensive character, this plea puts in issue everything necessary to be shown by the plaintiff to make out his case,<sup>2</sup> and consequently enables the defendant to contest every separate head of damage introduced to make up the total amount. In fact everything which is proper for the consideration of the jury in mitigation may be given in evidence under the general issue,<sup>3</sup> and the facts which bear on the damages in actions of this sort are infinite in number and variety. Nevertheless in certain classes of injuries, such as libel and seduction, particular classes of facts will always tend to mitigate the damages, and these will be admissible as a matter of law ; in others, the question may be one of fact.

<sup>1</sup> *Winchester v. Craig*, 33 Mich. 205, 208.

<sup>2</sup> *Osborn v. Lovell*, 36 Mich. 245.

<sup>3</sup> *Delevan v. Bates*, 1 Mich. 97.

Aggravation is a wholly different matter. In torts, which are historically trespasses, *i. e.*, which involve the conception of a direct invasion of personal and property rights, it is a general rule, and one obviously necessary, that the whole wrong and its attendant injuries should be disposed of in one proceeding, even though it might conceivably be split up into different causes of action. Thus in libel, repetition of the words charged may be shown, and in seduction, the fact that the wrong was accomplished under promise of marriage. Such are said to be circumstances of aggravation, and will either warrant exemplary damages, or damages for mental suffering. But such circumstances, not being involved in the charge, must obviously be specially alleged. Having been alleged, the defendant may as to these also introduce evidence in mitigation.

It is a principle of the common law that for a joint tort, or tort committed conjointly by two or more persons, the liability is both joint and several; *i. e.*, that the whole amount of the damages may be recovered from any one or more of the wrong-doers; and also that if the damages are recovered from any one, he cannot apportion them and recover back what he has paid over and above his share, from the others. Of these rules the second is usually expressed in the formula that there can be no contribution between wrong-doers. It has however been much trenched upon by modern decisions. So many exceptions have in fact been engrafted upon it, that it is practically confined to cases of active participation in acts recognized by the wrong-doers as torts.<sup>1</sup> These limitations however do not affect the first principle, under which a plaintiff always recovers his whole damages in one action, and for this purpose may join all the defendants, or select such as he

<sup>1</sup> *Merryweather v. Nixan*, 8 T. R. 186; *Nickerson v. Wheeler*, 118 Mass. 295; *Palmer v. Wick & Pulteneytown S. S. Co.*, [1894] A. C. 318. See the cases collected and revised, 1 N. Y. Law Review, 115.

wishes to hold responsible. The question of contribution arises after the verdict for damages.<sup>1</sup>

As the terms "special damage" and "special damages" are continually met with in actions of tort, it should be understood that they are not equivalent. Every complaint concludes with a demand for a sum of money as damages, and this is made sufficiently large to cover all the heads of damages which the plaintiff expects to be able to prove. Under a general demand, however, he can prove only such items as are logically involved in the statement of his case as naturally proximate. Special damages are any damages specially demanded in a complaint because they are not of that kind which, being logically imported by the complaint as necessary or natural consequences, the jury will have a right to award under a general claim of damages. For instance, all consequential damages in contract claimed under a special notice bringing the case within the rule of "the contemplation of the parties," are special damages. Special damage, also called special or particular injury, is, properly speaking, the kind of injury which gives a right of action otherwise non-existent. In slander, many spoken words are not in themselves actionable; they do not in law import injury. But if the plaintiff shows that they have caused him a special injury, he may maintain an action. A common nuisance gives no right of action to an individual; but if one affected by it shows special damage to himself, this gives him a right

<sup>1</sup> Compare the analogous case in equity of a breach of trust by co-trustees. Here if all are responsible, they are all entitled to contribution among themselves, no matter what their various degrees of wrong-doing may be. They must also be all joined, and made parties to the suit. It is a result of this difference between the two systems that the injured party in such cases has often more complete and speedy redress at law than by means of an equity suit, as he is entitled to treat the breach of trust as a tort, and recover *in solido* from any trustee he may select.

of action. In an action for assault and battery, the plaintiff offers evidence that, as a result, a tear passage has been closed, and his eyesight impaired. This is a "necessary and natural" consequence, and can be recovered without being pleaded as special damages.<sup>1</sup> In an action for a nuisance, as just stated, if no special damage is set up, the plaintiff has no action. But the case may arise, and indeed is by no means uncommon, where a contract has been made not to establish a nuisance in the vicinity of premises. On breach the person entitled to the benefit of this contract sues. He must recover nominal damages, for the breach is itself actionable, but he cannot recover substantial damages unless he shows specially how it has damaged him; for the breach of the contract logically involves nothing but the mere fact of a nuisance, which does not of itself import particular injury to the plaintiff any more than any one else.<sup>2</sup> In the first case neither special damage nor special damages are involved; in the second both are involved. Confusion would be avoided if the term "special damages" were restricted to cases involving solely a question of pleading; and the sort of damage necessary to support certain kinds of action were always called special or particular injury, or particular damage.

A brief review of some of the more common decisions of actions of tort will perhaps make what has been said clearer. It must be noticed that actions for torts affecting the *domestic relations* (master and servant, parent and child, husband and wife), being founded upon the infringement of rights neither properly of property nor contract, form a class apart; and it has been thought best in this peculiar case to state the law in the form of separate rules. It will be found that the extent of recovery often depends not only on the nature of the injury, but on that of the

<sup>1</sup> Blake v. Lord, 16 Gray, 387.

<sup>2</sup> Bogert v. Burkhalter, 2 Barb. 525.

form of action itself, and that to understand the effect of the latter, it is necessary from time to time to recur to the historical origin of these forms, some of which are extremely ancient. Beginning with the simplest and most primitive forms of injury, and a system of redress unprovided with any legal measure of recovery, and in a state of society from which our conceptions of contract and even property seem to have been in a great measure absent, the outlines of the process may be traced by which our method of legal valuation and measurement of rights and the infringements of them, has slowly but surely disentangled itself from, and in part supplanted, the arbitrary power of the early jury. The following general rules, of which some illustrations will be given from time to time under the various actions, are brought together here, as probably embodying as nearly as may be the principles upon which courts of justice in cases of tort act. From these principles, if they have been accurately stated, spring the whole body of minor rulings upon offers of proof, or heads of damage which make up the decisions upon this branch of the subject. The allowance of exemplary damages has been elsewhere discussed; the principles of compensation in tort are best seen in jurisdictions which do not allow damages by way of punishment. In the appendix is given a case from the Year Books which illustrates the early confusion of criminal procedure with that in tort, as well as the function of the primitive jury with regard to damages.

#### RULES.

39. *In all cases of tort, involving injury to rights of property or contract only, and where the act complained of is wholly indifferent as regards motive, the measure of damages is the value of the property or rights destroyed or injuriously affected at the time of the injury.*

40. *In all cases, so far as the effects of the injury upon rights of property or contract can be separately estimated, the extent of recovery is a matter of law.*
41. *In all cases involving other elements of injury, the amount of the verdict is in the discretion of the jury.*
42. *Circumstances of aggravation are admissible to enhance and circumstances of mitigation to reduce the verdict.*
43. *Whenever upon an examination of the verdict in the light of the evidence, the amount awarded appears to be either so great or so small as to show that it must have been the result of passion, prejudice, ignorance, or mistake, the plaintiff is entitled to a new trial.*
44. *Such a case occurs whenever the verdict clearly falls short of, or is clearly in excess of an amount which all the heads of damage taken together show to be reasonably recoverable.*

## CHAPTER XIII.

### PERSON AND FAMILY.<sup>1</sup>

Every species of action in use at the present day has its origin in some common-law writ, designed, not only to bring the defendant into court, but to inform him of the general nature of the cause of action. For every question of common occurrence, a separate writ and form of action existed. Thus, for the trial of any real property right or title, there was a special writ deriving its name from the nature of the question involved; on the other hand, for the recovery of a sum of money, *debt* lay; for breach of an agreement under seal, *covenant*; for the recovery of chattels, *detinue*, and *replevin*.

In the case of most modern actions for injuries to the person or property, their historical source is the writ of Trespass. This writ, at first confined to cases of violent injury, or injuries done by "force and arms,"<sup>2</sup> of which assault and battery is a common instance, was by a simple extension of the idea made to cover all direct injuries to the person,<sup>3</sup> or to tangible property in the possession of the person wronged, as in the ordinary case of trespass upon lands, and trespass for carrying off goods and chattels. But as new remedies were from time to

<sup>1</sup> This chapter deals with injuries to the person, individually, and as a member of a family; not with what are called in our law personal actions. Such injuries may be mental, moral, or physical; they affect personal rights, or grow out of the domestic relations.

<sup>2</sup> 2 Finlason's Reeves, 508; Stephen on Pleading, Ch. I; Y. B. 12 H. IV. 3, pl. 4.

<sup>3</sup> Scott v. Shepherd, 2 Wm. Bl. 892.

time needed, a method was devised under the authority of Parliament<sup>1</sup> by which, in cases containing circumstances different from but analogous to those covered by any existing writ, a new writ was made "on the case." A new action was still a kind of trespass; the difference was that the old trespass remained a rigid form adapted to cover only the injuries just mentioned; while trespass "on the case," being elastic, was gradually employed, not only to cover any new cases actually resembling those coming under the head of trespass, but almost every imaginable form of injury to person or property. Almost every common-law action of tort at the present day must be either an action of trespass on the case or some form of trespass. Thus in the action of *trover*, a species of action on the case has been developed, adapted to try disputed questions of property in goods and chattels. So, libel, slander, and malicious prosecution have gradually come to be ranked as themselves separate forms of action, but in reality they are all merely different kinds of actions on the case.<sup>2</sup>

---

**ASSAULT.**—So far as the measure of damages in actions involving injuries to the person, or personal rights,

<sup>1</sup> Stat. Westminster 2, 13 Ed. I. c. 24.

<sup>2</sup> The fact that Parliament had to be resorted to for authority to introduce the action on the case is often cited as a striking instance of primitive attachment to form. But, except for the power derived from this statute, what authority exists, even at the present day, outside the legislature, to give new rights of action? No court claims the right to devise new actions, as occasion may arise; in our present system the power is essentially legislative. The mode by which the action on the case was introduced seems to be in complete accord with the principles on which the later development of our law rests. There was a period when the king or chancellor issued new writs, as occasion required, but this process seems to have ceased by the time of Edw. I. See 2 Pol. & Maitl. Ch. IX.

is concerned, the simplest case would seem to be presented by the action of trespass for an assault. An assault consists of overt acts reasonably producing the impression that violence against the person is about to be attempted.<sup>1</sup> Actual contact is not necessary; consequently in all such cases nominal damages must be recoverable. As the chief injury in case there is no contact is either fear of bodily harm,<sup>2</sup> or, in the case of indecent assault,<sup>3</sup> wounded feelings, shame, and humiliation in addition, it would seem an inevitable result that in this form of action compensation for mental suffering can be recovered without any physical injury whatever. No case seems yet to have arisen involving a discussion of the measure of damages. It may be thought that this class of cases throws doubt on the suggestion made elsewhere,<sup>4</sup> that in order to recover for mental suffering a right of action independent of the mental suffering itself must exist. But it is believed that, closely examined, the right of action in assault is independent. A cause of action for assault is made out not by a statement that mental suffering has been caused the plaintiff through the acts and words of a person at a distance. As already remarked, no such right of action exists. It is made out by a statement of acts reasonably calculated to produce the impression that violence will be attempted. This would naturally produce fear, and fear would naturally be an element of damage; but this is very different from saying that A. can recover against B. because B. frightened him.

<sup>1</sup> *Clark v. Downing*, 55 Vt. 259; *I. de S. v. W. de S.*, Y. B. Lib. Ass. f. 99, pl. 60.

<sup>2</sup> *Beach v. Hancock*, 7 Foster, 223.

<sup>3</sup> *Alexander v. Blodgett*, 44 Vt. 476.

<sup>4</sup> See Chap. VIII.

**PERSONAL INJURY.**—The additional circumstance of bodily violence makes the action one for assault and battery, and in this case, as also that of every other action for personal injury (*e. g.*, the common action against a railway for injuries caused by negligence), the heads of damage embrace whatever can be included under “bodily injury.” This class of actions is peculiar in there being what resembles a pretty well-defined general rule of damages, though one by no means easy of application. It has been already stated that in every class of action in tort there is involved a natural or normal rule of damages. When an injury to the body is concerned (there being no question of the moral character of the defendant’s act), it is obvious that this will naturally involve (1) pain; (2) mental distress involved in pain; (3) expenses of cure; (4) time lost. If the injury has permanent effects, there will be a fifth head of damage,—the permanent diminution in value of the physical, mental, and moral faculties, of which the only possible pecuniary measure is the permanent diminution of earning capacity. By putting these heads of damage together the usual rule of damages in personal injury cases is made out, and has been laid down in a multitude of cases. For reasons already given, it is not here thrown into the form of a separate rule; and indeed perhaps this is as good an illustration as any that could be given of the *unfixed* character of the measure of damages in the various actions of tort. If the heads of damage be put together, the Rule will appear as follows:—

*In actions for personal injury the measure of damages includes compensation for pain and mental suffering, expenses of nursing and medical attendance, time lost, and if the injury has lasting effects, permanent diminution of earning capacity.*

This has all the appearance of a rule of law, like that in *Hadley v. Baxendale*; but it is in reality nothing of the

kind. First, suppose the injury is not permanent, obviously the last clause disappears altogether; second, there may be no time lost; third, there may be no expenses of cure; fourth, mental suffering may be wholly absent; and fifth, there may be no pain; in which case the plaintiff will find that the rule has disappeared, and as damage is the gist of this action he cannot recover even nominal damages. When we come to examine contracts, we shall find rules which cannot be taken apart and put together again in this way. It seems much preferable in such cases as this to speak of heads of damage or recovery, than of any fixed rule.

The last head above given is prospective, and depends not only on the probable duration of the injury, but upon probable duration of life, *i. e.*, the particular life affected. To arrive at this it is necessary to resort to the life and annuity tables used by insurance companies, giving the "expectation of life" at any age; but as these only show the probable average duration of the lives of a very large number of persons they are not absolute guides for the jury, which must take in consideration all the contingencies of the individual case.<sup>1</sup> Where actual malice is added to the wrong, circumstances of aggravation are introduced, which will enhance the damages; while on the other hand circumstances of mitigation may in any case lessen them; but mitigation cannot diminish the damages to be awarded for the injury itself, so far as a pecuniary standard can be applied.

#### RULES 41-44.

#### ILLUSTRATIONS.<sup>2</sup>

(a) Plaintiff is a man of middle age making an income of £5000 a year. The effect of the injury is irreparable, he has

<sup>1</sup> *Vicksburg & M. R. R. Co. v. Putnam*, 118 U. S. 545.

<sup>2</sup> In this division of the subject, to avoid repetition, the rules are referred to by number.

endured great pain and suffering, and he will probably never recover. He has already incurred expenses amounting to £1000, and lost his income for sixteen months, while he will be subject to further expense for a long time. A verdict for £7000 must be set aside as inadequate, because the positive pecuniary loss already sustained nearly amounts to this, leaving nothing for health permanently destroyed and income permanently lost.<sup>1</sup>

(b) In an action for personal injuries, a verdict is rendered giving plaintiff compensation for loss of time, and loss of capacity to labor, and also for money paid to another to supply the loss of labor. The verdict cannot be sustained; it is double compensation for the same element of damage, *i. e.*, the loss of capacity to labor.<sup>2</sup>

(c) An accident occasions deformity. The jury may take into account the permanent annoyance caused by it.<sup>3</sup>

(d) In a case in which exemplary damages are not permissible, the judge charges that plaintiff is entitled to recover for "bodily pain and suffering." This is not a ground of exception.<sup>4</sup>

(e) The trial judge charges the jury that they may consider the bodily pain and suffering which plaintiff "has suffered or is likely to suffer," provided that it is "reasonably certain" that such damages will "inevitably and necessarily" result. This is not open to exception.<sup>5</sup>

(f) The action is for personal injury, occasioned by negligence. The trial court allows the jury, in its discretion, to give interest, and the verdict assesses the damages at \$7000, with seven years' interest, \$2940, aggregating \$9940. Exemplary damages are not demanded. The verdict for the larger amount cannot stand. The only heads of damage recoverable are men-

<sup>1</sup> Phillips *v.* Southwestern Ry. Co., 4 Q. B. D. 406; cf. Robinson *v.* Waupaca, 77 Wis. 544.

<sup>2</sup> Blackman *v.* Gardner & P. Bridge, 75 Me. 214.

<sup>3</sup> Power *v.* Harlow, 57 Mich. 107. So of mental suffering, anxiety, suspense, and fright. Sherwood *v.* Chicago & W. M. Ry. Co., 82 id. 374.

<sup>4</sup> Ransom *v.* N. Y. & Erie R. R. Co., 15 N. Y. 415; acc. Pa. R. R. Co. *v.* Allen, 53 Pa. St. 276.

<sup>5</sup> Curtis *v.* Rochester & S. R. R. Co., 13 N. Y. 534.

tal and physical pain; loss of time, expenses, and any permanent disability in health, mind, or body. The amount allowed for interest must be remitted, or a new trial had.<sup>1</sup>

(g) The action is for assault and battery. The insult and indignity inflicted by giving a blow with anger, rudeness, or insolence aggravates the tort.<sup>2</sup>

(h) In an action against a railway company, the plaintiff obtains a verdict for \$25,000. It is excepted to as excessive; and on a review of all the evidence, including appeal by counsel to the jury to give a large verdict on the ground that the company is "able to pay," the court holds the verdict too large; the plaintiff must remit \$5000 or take a new trial.<sup>3</sup>

(i) The case is one of aggravated assault by a brakeman, in the employment of a railroad company, authorizing exemplary damages. The verdict is for \$4000. The court, while declaring the verdict "large," refuses to set it aside as not being "clearly excessive."<sup>4</sup>

**LIBEL AND SLANDER.** — An action for libel may be maintained in the case of any publication written, printed, or pictorial tending to bring the person to whom it refers into hatred, ridicule, or contempt. The gist of the action is said to be malice, but the word is used in two different senses, which it is necessary to distinguish. The malice requisite to sustain the action means simply that implied by the law from the facts which give the right of action. It may also mean what it means in ordinary language, *i. e.*, evil motive, wanton disregard of the rights of others, a desire to injure, &c.<sup>5</sup> When it is said that the gist of the action is malice, malice of the first sort is meant, and to show this mere proof of the publication (*i. e.*, communica-

<sup>1</sup> Louisville & N. R. R. Co. v. Wallace, 91 Tenn. 35.

<sup>2</sup> Smith v. Holcomb, 99 Mass. 552.

<sup>3</sup> Waterman v. Chicago & A. R. R. Co., 82 Wis. 613.

<sup>4</sup> Hanson v. European & N. A. R. R. Co., 62 Me. 84.

<sup>5</sup> King v. Root, 4 Wend. 113, 139; Voltz v. Blackman, 64 N. Y. 440, 444.

tion to a third person) of the defamatory matter is enough. This sort of malice is also called malice in law, or implied malice.<sup>1</sup> Consequently, by proof of the publication, the plaintiff makes out a *prima facie* case. If now, however, the defendant shows a justifiable reason for the publication, (as where, by means of his relation to the matter and his duty to the person communicated with, he was *privileged* to make the statement), it is said that the inference of malice in law is rebutted, and the plaintiff must show malice in fact, as by proving the communication to have been false and the motive for making it bad.<sup>2</sup> But this merely means that in such a case the privilege does not cover the libel, and the evidence of motive must be gone into upon the question of mitigation, aggravation, or of exemplary damages. The libel remains a libel, and the liability, which has from the first existed, still exists. But the defendant may show that a false (and therefore non-privileged) communication was made upon an *occasion* that was privileged, and under an honest belief in its truth (mitigation). The plaintiff may show that the motive for the false statement was the desire to injure him, (aggravation, or exemplary damages).<sup>3</sup>

Strictly speaking, however, wherever damages are limited to compensation, and the rule of exemplary damages

<sup>1</sup> As an element of liability it is "only nominal," Cooley on Torts, \* 103; in other words it is non-existent. It is in the criminal law that the state of mind of the defendant is important. It may be suggested that the use of the term in civil actions is historically connected with the notion of guilt once naturally associated with torts, such as assault and battery, which were also crimes at a time when the two species of liability were constantly involved in one and the same proceeding. It was of such offences that a large part of the business of the courts at first consisted. 1 Pol. & Maitl. 15.

<sup>2</sup> Bush v. Prosser, 1 Kern. 347; Moore v. Man. N. Bk., 123 N. Y. 420; Wilson v. Noonan, 27 Wis. 598, 610.

<sup>3</sup> Shipp v. Story, 68 Ga. 47; Bennett v. Smith, 23 Hun, 50.

is repudiated, proof of motive cannot mitigate the damages; for the damage is to the reputation, and the extent of this injury is not affected by the question whether the defendant's motive was good or bad. Consequently in Massachusetts, where the doctrine of exemplary damages has never been admitted, it has been held that in an action for slander (which in this respect does not differ from libel), evidence of probable cause for belief in the truth of the charge is not admissible at all. Such evidence has no bearing on liability, and it is not available for the purpose of mitigating damages, because the damages are measured by the injury.<sup>1</sup>

Before dismissing the question of liability, it may be remarked that if what has been said about malice be true, it must follow that an insane person may be held responsible in libel, or slander, but the question has been considered by the Supreme Court of Massachusetts, in a manner which seems practically to dispose of it. The action is slander, and the defence insanity. The court, while observing that they give no opinion how far, or to what degree insanity is to be received as an excuse for defamatory words, remark: "When the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it is manifest no damage would be incurred. But where the degree of insanity is slight or not uniform, the slander might have its effect, and it would be for the jury to judge upon the evidence before them, and measure the damages accordingly." In other words, a libel is always a libel, and actionable words are always actionable; if they consist of the ravings of a person known to be, or who evidently is a lunatic, his words will produce no damage to the reputation of any one, but otherwise damage may result; the question is not one of liability, but one of the amount of

<sup>1</sup> *Watson v. Moore*, 2 Cush. 133.

damage, which is one of fact for the jury. The law is precisely the same with regard to torts by persons under age. For the prattle of a malicious child no one goes to a jury for damages; but a person under age is responsible for the effect of his words as in any other case. "God forbid," says Lord Kenyon, C. J., "that he should not be answerable."<sup>1</sup>

Coming now to the question of the measure of damages, it is clear that no definite rule can be laid down, as is possible in cases affecting property and contracts, for there is no property or pecuniary standard to be applied. The direct injury suffered is damage to the reputation, and the extent of this depends upon all the facts proved in each particular case. Added to this, however, we have injuries to feelings,<sup>2</sup> for these are always the necessary result of defamation, and such consequential damages as may, subject to the rules of proximate cause and certainty, be proved. Generally speaking, all facts having a tendency to mitigate or aggravate damages, or to show the motive of the libel, may be proved on one side or the other, and the amount of the verdict is in the discretion of the jury.

The action of slander lies for oral defamation. In libel, mere proof of publication is sufficient. But of spoken words the law takes a very different view. Insulting language or conduct alone is, as already explained, never a ground for damages.<sup>3</sup> Indeed, it has been expressly decided that although insulting language or conduct may aggravate an assault, it is not itself an assault.<sup>4</sup> It is clear that if an action lay for all inconsiderate, vituperative, reproachful, or condemnatory words, it would lead to great abuses, and fill the courts with absurd and trivial

<sup>1</sup> *Jennings v. Rundall*, 8 T. R. 335, 337.

<sup>2</sup> *Markham v. Russell*, 12 All. 573; *Blumhardt v. Rohr*, 70 Md. 328.

<sup>3</sup> *Lynch v. Knight*, 9 L. H. Cas. 577.

<sup>4</sup> *Stearns v. Sampson*, 59 Maine, 568.

suits. It is equally clear that for words naturally and necessarily producing injury an action must lie. But a third class of cases also exists where the words, though not in themselves such as naturally lead to the inference of damage, do, as a matter of fact, produce it, and in this case, the person injured has a clear right to redress. Had the law of defamation developed itself in what may be termed a natural way, the cases would have classified themselves under these heads in accordance with the actual facts; but an arbitrary rule introduced into the law of England in early times has to a certain extent made the law of slander artificial. Instead of inquiring, under the rule of certainty and proximate cause, into the effect of the words spoken, the courts early laid it down as matter of law that in the following cases only were words slanderous, or actionable, *per se*. 1. Words falsely spoken imputing the commission of a crime involving moral turpitude, for which the party might be indicted and punished. 2. Words imputing an infectious disease, likely to exclude him from society. 3. Words imputing unfitness to perform the duties of an office or employment. 4. Words prejudicing him in his profession or trade. 5. Words tending to disinherit him.<sup>1</sup> In all other cases spoken words are either (a) not actionable at all, or only actionable (b) on proof of special damage. In other words, in the five cases mentioned, the imputation imports damage, and if nothing else but the imputation is proved, the jury can give substantial damages.<sup>2</sup> It has been said<sup>3</sup> that

<sup>1</sup> Bigelow on Torts, 84; Pollard v. Lyon, 91 U. S. 225; Alexander v. Jenkins [1892], 1 Q. B. 797. The aversion of the English Courts in early times to holding words actionable was very marked. It is suggested in a late work, that this was originally a peculiarity of the royal administration of justice, and that slander was redressed in the local or ecclesiastical courts. 2 Pol. & Maitl. 535.

<sup>2</sup> Tripp v. Thomas, 3 B. & C. 427.

<sup>3</sup> Dicken v. Shepherd, 22 Md. 399, 415.

whether the words in themselves are actionable or not, no evidence of any particular loss or injury is admissible, unless such loss or injury is alleged in the declaration; this means such losses as do not necessarily follow from the slander. Damages necessarily involved in the cause of action are always recoverable. If it were requisite in all cases to state these, the distinction between words actionable *per se* and others would disappear. To accuse an innocent person of a crime, gives him a right to some damages, and he may prove its effect on his reputation; but if he has lost a position by it, he must allege this, and prove it, as in the case of any other consequential damages. In the case of words not actionable *per se* the right of action depends on the statement of some special injury in the form of a claim for special damages.

This arbitrary division, making it necessary to prove special damage in the case of any imputation not falling within the five classes of actionable words is an anomaly, and has produced results much regretted by the courts which have been forced to apply the rule.<sup>1</sup> The objection to it is not that there should be no division, but that the division as established is artificial. Thus no imputation could more necessarily and naturally import damage than that of unchastity in the case of a woman of good character. Yet to recover she must prove special-damage, and much ingenuity has been resorted to in order to eke out proof in such cases; and it has been decided that if in consequence of such words a woman is deprived of substantial benefit from the hospitality of friends, this is enough to maintain an action.<sup>2</sup>

Perhaps, on the whole, it may be said that the general rule which pervades our entire law is that an action does not lie for words spoken or written, without proof of

<sup>1</sup> Roberts v. Roberts, 33 L. J. Q. B. 249; Lynch v. Knight, 9 H. L. Cas. 577; Alexander v. Jenkins [1892], 1 Q. B. 797.

<sup>2</sup> Moore v. Meagher, 1 Taunt. 39; Williams v. Hill, 19 Wend. 305.

ensuing damage. This is seen in the action of deceit. No action lies for a mere falsehood, however glaring, unless it causes damage of some kind. And in the action called slander of title, special damage must be shown.<sup>1</sup> To this general rule the action of slander for actionable words and of libel, are exceptions, warranted by the fact that in these cases damage is logically imported. The anomaly then is that in slander there should be a strict rule of law that many words logically importing damage shall be treated as if they imported none.

## RULES 41-44.

## ILLUSTRATIONS.

(a) In an action for slander, charging plaintiff with larceny, the defendant offers evidence, in mitigation of damages, of plaintiff's general bad character. The evidence tends to show the value of the reputation for injury to which the action is brought, and is admissible.<sup>2</sup>

(b) The suit is slander for words charging the plaintiff with stealing from his employer. The defendant offers to prove in mitigation that in a single instance he was reputed to have stolen from him. The evidence is inadmissible. What is in issue is the general character of the party, not common rumor as to particular transactions.<sup>3</sup>

(c) In an action for slander, charging the female plaintiff with unchastity, the defendant offers evidence tending to impeach her general reputation for chastity at the time when the words were spoken; the court excludes the evidence. There must be a new trial; under a general denial the plaintiff's character in the respect impugned is in issue.<sup>4</sup>

<sup>1</sup> *Malachy v. Sloper*, 3 Bing. N. C. 371; cf. *Brook v. Rawle*, 4 Ex. 521; *Pitt v. Donovan*, 1 M. & S. 629.

<sup>2</sup> *Sayre v. Sayre*, 1 Dutch. 235.

<sup>3</sup> *Mahoney v. Belford*, 132 Mass. 393.

<sup>4</sup> *Duval v. Davey*, 32 Ohio St. 604; what she sues for is the damage to the value of her reputation as a whole. A want of good repute in any one respect must impair this value.

(d) The defendant is proved to be worth more than \$100,000; the plaintiff is a man in humble life. The slander imputed to him the crime of perjury, in reference to his testimony in a suit to recover the wages of his labor; the words were uttered in a public place, in the hearing of many persons. A verdict of \$2000 is not excessive.<sup>1</sup>

(e) The action is for calling A. B. a thief; there is no evidence in mitigation. A verdict of \$1000 will not be set aside.<sup>2</sup>

**MALICIOUS PROSECUTION. FALSE IMPRISONMENT.** — The action for personal injury is based primarily on damage to the person only; slander and libel on damage to the reputation. The action for malicious prosecution may be grounded on a violation not merely of the right to one's reputation, but also to that of liberty and property.<sup>3</sup> The cause of action exists against any one who without reasonable and probable cause institutes a prosecution for a crime falsely charged to have been committed. It would be idle to attempt to enumerate all the heads of proof and elements of damage which may need to be considered in an action for malicious prosecution. It is enough here to say that, as in slander and libel, every particular of aggravation or mitigation may be gone into, that consequential damages will be allowed, subject to the rules of proximate cause and certainty, and that, as in so many other cases of tort, when all the proof is before the jury, the measure of damages is very much in their hands. They may, in a proper case, give exemplary damages, and on the other hand if the verdict on appeal is seen to have been clearly rendered under the influence of prejudice, ignorance, or passion, it will be set aside. Inasmuch as a criminal prosecution imports injury to reputation or deprivation of liberty, or expense, or all three, the question of special damage does not properly arise. If the plaintiff's declara-

<sup>1</sup> *Flagg v. Roberts*, 67 Ill. 485.

<sup>2</sup> *Miller v. Johnson*, 79 Ill. 58.

<sup>3</sup> *Savile v. Roberts*, 1 L. C. Raym. 374.

tion show nothing more than an attempt to indict, that the grand jury has returned the bill "not found," and that the charge preferred was only that of assault, no action will lie without proof of special damage; for the charge in itself produces, as already explained, no necessary injury to the reputation, no expense has been caused, and the right of liberty has not been infringed.<sup>1</sup> But a declaration of this sort does not, properly speaking, present a case of malicious prosecution. In malicious prosecution legal malice is involved in the mere fact of prosecuting for a crime without reasonable and probable cause. There is a large class of actions closely resembling malicious prosecution which are, however, slightly different in these two respects. These are cases where the plaintiff in substance complains that the defendant has maliciously made use of process of court against him. Here, as in the case cited above, the act complained of may not of itself import damage, and that being the case, special damage must be alleged.<sup>2</sup>

The action for false imprisonment differs from malicious prosecution (so far as injury is concerned), chiefly if not altogether, in the fact that the wrong may be accomplished without any prosecution and consequently without injury to reputation.

---

**PRIVACY.** No complete classification of personal rights can ever be finally made, because in most cases they are first defined by the protection which the law throws round them, and as society develops and becomes more and more complicated, protection is found from time to time to be needed in regard to matters not previously thought of as requiring protection. An instance of this is the recent development of the right of Privacy, or the right to be free

<sup>1</sup> *Byne v. Moore*, 5 Taunt. 187.

<sup>2</sup> *Frierson v. Hewitt*, 2 Hill, S. C. 499.

from intrusion. It is only in modern times that competition in gathering and publishing news, and other causes, have produced a tendency to invade the privacy of persons who have no public life of any kind, and by a variety of means force upon them a publicity which neither they nor those connected with them desire. Thus the attempt has been made to force a private family into an unwelcome publicity by the erection of a statue to one of its members; again, a common case is the unauthorized exhibition of photographs of private persons in public places, or pictures of them in newspapers, for the gain of the exhibitor or publisher. The moment these invasions of privacy were brought to the notice of the courts, the usual existing remedies were found to be applicable, and it is now well settled that in such case there is not only a right, in equity, to an injunction, but to an action on the case for damages. The measure of damages has not yet been much, if at all, considered; probably because those affected have been generally contented with a suppression of the grievance. The principal head of damage would seem to be the privacy destroyed or impaired, and the jury would have a discretion to give damages proportioned to all the circumstances proved.<sup>1</sup>

---

DOMESTIC RELATIONS. — Aside from ordinary personal rights, the law redresses interference with the rights growing out of the domestic relations. Such redress is founded on principles affected by the peculiar character and history of the relation itself. If we consider that between parent and child, we see that it is of necessity not governed in any way by the idea of contract. The child

<sup>1</sup> Pollard v. Photographic Copying Co., 40 Ch. D. 345; Schuyler v. Curtis, 64 Hun, 594; Murray v. Gast Lith. & E. Co., 8 Misc. 36; Corlies v. E. W. Walker Co., 64 Fed. R. 280. Schuyler v. Curtis has been overruled since the above was written (Ct. of App. N. Y. L. J. Dec. 4, 1895), but solely on the ground that the alleged invasion of privacy was fanciful.

during minority must be under the absolute control and protection of some one, and being during this period incompetent to act for itself, must act under the direction of that person according to rules established by law or custom. The relation of guardian and ward is of like nature, the guardian being a person substituted for the parent. The relation of husband and wife, though now resting partly on agreement, is in primitive conditions of society a fixed relation, based on the subordination of the wife, while that of master and servant (with which we now associate some definite notion of contract) was originally that of master and slave; the responsibility of the one for the acts of the other is still founded upon some theory of control or responsibility quite distinct from that of contract.<sup>1</sup> All these relations are historically connected with the primitive institution of the family, with the father as its head. His early right of control over his wife, child, and servant closely resembled, and indeed probably antedated rights of property, and even at the present day his wife and child, as well as his servant, are all regarded by the law as owing him service. As the rights of the individual have been developed, and the principle of freedom of contract applied more and more extensively to human affairs, the fixed rules of law governing the family have declined in importance, but they still constitute a class apart, and especially so in respect to the law of damages.

One large class of actions growing out of the domestic relations, is that in which the master sues to recover for an injury done his servant, and under the same head, the husband for injury to his wife, the father to his child. It is generally said that these actions are grounded upon the loss of service, and it is no doubt true that the rules of common-law pleading required an allegation *per quod*

<sup>1</sup> 1 Hammond's Blackst. Com. 719 (note 22); Holmes' Com. Law 228; Maine's Ancient Law, Ch. V.

*servitium amisit.* The reason of this seems to have been that as the wrong was committed against the *person* of the servant, the master suffered only indirectly, and as it was clear that a master suffered loss of service, so the idea was extended to the case of husband and wife and father and child. On the other hand, that the relations of husband and wife, and parent and child include many ideas entirely different from that imported by service, is obvious, and must from the earliest times have been so.

The injury suffered is in its nature different in the different cases. In the case of master and servant the injury is really loss of the pecuniary value of the service. In the case of a wife, the injury is not merely this, but the husband may have to care for his wife during an illness, and, as he is bound to protect and maintain her, be put to labor and expense in other ways. In the case of a child, not only is there a loss of service, but the injury may, in one particular case, that of seduction, be of such a character as to entail not only great incidental loss, in the way of medical expenses, but also great mental distress and anxiety on the part of the parent. In all but the last case, the common law recognizes two distinct rights of action. First, the servant, wife, or child, has a right of recovery in some form as for a personal injury, and in this action damages for pain and injury to feelings are recoverable; this disposes of all the heads of damage which may be supposed to be involved in the personal injury; the mental suffering of the master, husband, or parent is not itself a head of damage, because the cause of action is injury to the servant, wife, or child. (It is not, for reasons already given, an independent cause of action.) By whom the action is brought does not matter. At common law, for instance, the husband having a direct interest in the result of the suit must be one of the parties plaintiff. He was entitled to the fruits of the verdict;

but this did not affect the fact that for libel, assault, and battery, &c., a personal right of action existed. Independently of this the husband was entitled to recover the damages caused to him through the loss of the service of the wife, — and these two actions together exhausted all the heads of damage. And such is the law generally to-day.<sup>1</sup>

A similar double action and double right to damages has always existed in the case of master and servant, and parent and child. Consequently in this class of actions generally the measure of damages in the action by the master, parent, or husband, has been practically limited to the damage to him which would not come into consideration in the action for the injury to the person. Ordinarily this would be little but the loss of service, but this may not be all. As just pointed out, one consequence to the husband, or parent, is very likely to be loss of time, and care, and expense of attendance. For these a recovery is generally allowed. If a rule were to be stated it would be as follows.

#### RULE.

45. *In an action by a husband, father, or master for a tort, affecting the person of his wife, child, or servant, the measure of damages is the amount of pecuniary injury, present and prospective, proximately ensuing to one occupying the relation in question towards the person who has suffered the injury.*

#### ILLUSTRATIONS.

(a) Husband and wife recover judgment in an action for personal injuries. The husband now sues to recover damages for the loss of his wife's services. The proper measure of

<sup>1</sup> Bigelow on Torts, 132; *Smith v. City of St. Joseph*, 55 Mo. 456.

damages is what he has paid for hired service during his wife's disability, as well as for the value of his own time, spent in care of her, and expenses of medical attendance.<sup>1</sup>

(b) In an action by a husband to recover for loss of the wife's services through personal injuries, it appears that the latter was carrying on a millinery business as manager for the plaintiff, and that her services were of considerable pecuniary value. The measure of damages is the value of the services.<sup>2</sup>

(c) A father brings a similar suit growing out of an injury inflicted on his child. The recovery for loss of services is limited to the period of minority.<sup>3</sup>

(d) Suit is brought for loss of services of a son, through assault and battery by defendant. The jury cannot take into account the wounded feelings of the parents ; a separate action lies on behalf of the child in which the damages are very much in the discretion of the jury.<sup>4</sup>

(e) Suit is brought for loss of service of a son through defendant's negligence. Exemplary damages are not recoverable.<sup>5</sup>

The action for seduction differs from those which have just been mentioned in the fact that there is no double right. The person seduced, however grievously wronged, could not by common-law rules maintain a suit against the seducer, and consequently the only right of redress lay in the suit by the father, or any person entitled to her services, for any loss of service caused by the seduction. By the English law the father, as father, was not injured, and the relation of master and servant was an absolute prerequisite to establish liability.<sup>6</sup> But, the liability once

<sup>1</sup> *Lindsey v. Danville*, 46 Vt. 144 ; *Smith v. St. Joseph*, 55 Mo. 456.

<sup>2</sup> *Citizens' S. Ry. Co. v. Termaine*, 121 Ind. 375.

<sup>3</sup> *Frick v. St. Louis K. C. & N. Ry. Co.*, 75 Mo. 542 ; *Evansich v. Gulf C. & S. F. Ry. Co.*, 57 Tex. 123.

<sup>4</sup> *Cowden v. Wright*, 24 Wend. 429.

<sup>5</sup> *Gilligan v. New York & H. R. R. Co.*, 1 E. D. S. 453 ; *Black v. Carrolton R. R. Co.*, 10 La. An. 33.

<sup>6</sup> Cf. *Manly v. Field*, 7 C. B. n. s. 96 ; with *Terry v. Hutchinson*, L. R., 3 Q. B. 599. The suit is commonly brought by the father, but

established, it was early settled that recovery could be had for every element of damage; and this includes, when the plaintiff is the father, as is usually the case, his mental suffering. All circumstances of mitigation and aggravation are allowed, and the damages are very much at large, and in the discretion of the jury. So far as the rule is capable of exact statement, it may be expressed as follows:—

RULE.

46. *In an action for seduction the measure of damages is the total injury caused to the plaintiff, including loss of service, time, care, and expenses of attendance, and, if he is the father, for the dishonor, distress, and outrage.*

The history of the action for seduction is a remarkable illustration of the triumph (through the operation of the principle that damages must be adequate to the real injury), of substance over form. Beginning with cases in which the loss of actual service only was redressed, the courts gradually reduced the importance of the allegation of this loss into little more than a mere matter of inducement. “The parent comes into court as a master, but goes before the jury as a father.” Finally, we may find judges at the present day taking the last step, denying that the action is dependent on loss of service, and resting it on the relation of parent and child and their correlative rights and duties.<sup>1</sup>

this is not necessary. It may be brought by any one entitled to service; e.g., by an uncle for the seduction of a niece, living with him and actually rendering service. *Manvell v. Thomson*, 2 C. & P. 303.

<sup>1</sup> *Ellington v. Ellington*, 47 Miss. 329. Action lies if a daughter over age actually performs service, although the service be terminable at will. *Lipe v. Eisenlerd*, 32 N. Y. 229.

Generally, in cases of seduction, the evidence to prove loss of service is the fact of the birth of a child, and the consequent illness and confinement; but this is not essential. There may be no child, in which case evidence of loss arising from the necessity of medical attendance, and watching, has been held sufficient.<sup>1</sup> In seduction the gist of the action itself is the mere right to service, but damages are measured by the disgrace, &c., caused.<sup>2</sup>

### RULE 42.

### ILLUSTRATION.

The action is trespass for the seduction of a daughter. The foundation of the action being loss of service, the pecuniary means of the plaintiff may be given in evidence to show the effect upon him of this loss.<sup>3</sup>

**CRIMINAL CONVERSATION.** — Quite different from the action for seduction is that of criminal conversation. The liability has nothing to do with loss of service, but rests on a view of the relation of husband and wife, not entirely unlike that of property. The interest of a husband in his wife growing out of his relation as husband, is expressed by the word *consortium*, importing not merely the exclusive right to marital intercourse, but to her society and aid, in the relation established by marriage. Any invasion of his right to exclusive marital intercourse, whether accomplished by consent of the wife, or otherwise, gives him an action. Damages may be awarded for the aliena-

<sup>1</sup> *Manvell v. Thomson*, 2 C. & P. 303; *Abrahams v. Kidney*, 104 Mass. 222; *Blagge v. Hsley*, 127 Mass. 191; *White v. Nellis*, 31 N. Y. 405.

<sup>2</sup> *Terry v. Hutchinson*, L. R., 3 Q. B. 599; *Bartley v. Richtmyer*, 4 Comst. 38; *Damon v. Moore*, 5 Lans. 454.

<sup>3</sup> *Grable v. Margrave*, 4 Ill. 372.

tion of the wife's affections, for the loss of her society, and for the loss of her services. It has been said that the measure of damages is the value of the wife of whom the co-respondent has despoiled the plaintiff;<sup>1</sup> but it must not be supposed from this that an exact pecuniary standard is applied. The value even of a wife's *service* in the care of her household and the nurture and education of her children is incapable of precise measurement, and practically the husband is allowed to recover for all the various evil consequences of the wrong, in whatever sum the jury may think adequate, while all matters of aggravation and mitigation are admissible in evidence.

<sup>1</sup> *Cowing v. Cowing*, 33 L. J. n. s. Prob. 149; *Bigaonette v. Paulet*, 134 Mass. 123; *Yundt v. Hartrunft*, 41 Ill. 9.

## CHAPTER XIV.

### DEATH BY WRONGFUL ACT.

By the common law no action lay for causing the death of a human being; a number of reasons have been given for the rule, but none of them seem to explain it entirely. Thus, one reason given is, that by the common law the right to maintain any personal action died with the person; but this rule referred only to the person injured, and does not explain why the right of a master to recover damages for loss of service should be wholly obliterated if the injury has resulted in the death of the servant. Another is that in the case of felonious killing the private is merged in the public offence; but this does not explain the rule in the case of non-felonious killing. Again, where the death might be treated as the result of a breach of contract (as in the case of the death of a wife or a servant caused by want of professional skill) no reason is apparent why a recovery should not be had at least for the full prospective value of the service lost through the death; but whatever the real reason may have been, the rule has now been so long established, that it is beyond question;<sup>1</sup> and the result has proved so unsatisfactory that the common law has been modified, both in England and this country, by statute, so as to give a right of action, in all cases of death by wrongful act, for the benefit of the family of the deceased. If injuries resulting in death had the same consequences as other personal injuries, there

<sup>1</sup> See the leading authorities and the grounds of the rule fully examined in *Hyatt v. Adams*, 16 Mich. 180; *Grosso v. Delaware, L. & W. R. R. Co.*, 50 N. J. L. 317.

would often be a double action, one for the injury suffered by the person killed, the other by the master, husband, or parent, for the loss of service. In this way all possible heads of damage would be covered. But owing to the rule mentioned, the personal right to recover dies with the person, and the second action to recover for loss of service only covers the period between the injury and the death, in which the amount of damage is usually trifling. Consequently in this class of cases, the action for loss of service becomes unimportant, the right to recover for the personal injury disappears, and the new statutory action is the only one of importance.<sup>1</sup>

The statute not only gives the right of action, but establishes a general principle of compensation. Sometimes, in this country, it imposes a pecuniary limit of recovery (often \$5000) though no such limit is prescribed by the English Act from which ours are taken. The general principle of compensation is the pecuniary loss caused to the immediate relatives by the death. Where there is no pecuniary limit, the action is governed, as far as may be in applying the statutory rule, by common-law principles of compensation. Based as it is upon pecuniary elements, it shows at once a tendency to the production of rules; on the other hand, involving matters in which pecuniary standards are very difficult of application, and a cause of action peculiarly likely to excite the interest, prejudice, and passion of the jury, it is apt to illustrate in a striking way the relation between that tribunal and the court. This action shows perhaps more clearly than any other the limits of the rule of certainty. The rule of certainty does not apply to the amount of the damages; consequently, whenever it appears that there is

<sup>1</sup> See the various statutes of England and America collated and carefully analyzed. Tiffany on "Death by wrongful Act," pp. xviii.-xxiii.

an injury, that this is pecuniary, and has been caused by the death, no matter how impossible it is to tell what the amount of benefit derived from the continuance of the life would have been, the plaintiff must recover something, and so long as the amount is not out of all proportion to the injury, the verdict will stand. The amount may be a matter "partly of conjecture."<sup>1</sup>

#### RULE.

47. *In the statutory action for causing death the measure of damages is the amount of pecuniary injury caused by the death to those entitled to the benefit of the Statute, calculated, not merely with reference to legal liability to contribute to support, but to a reasonable expectation of pecuniary benefit from the continuance of the life.*

#### ILLUSTRATIONS.

(a) Parents sue for the death of a son, twenty-seven years of age. He lived away from his parents, but had been in the habit of visiting them and making them occasional presents of provisions, amounting to about £20 a year. They recover £120.<sup>2</sup>

(b) A father sues for the death of his son. The father is old and infirm, the son young, earning good wages and assisting his father in work for which the latter was paid 3s. 6d. a week. He recovers £75.<sup>3</sup>

(c) In an action brought by the father of the deceased, it appears that the father is old and infirm; the only evidence of reasonable pecuniary expectation is that the deceased five or six years before gave his father money when the latter was out of work. This is evidence enough to go to the jury.<sup>4</sup>

<sup>1</sup> Grand Trunk Ry. Co. v. Jennings, 13 App. Cas. 800, 804.

<sup>2</sup> Dalton v. Southeastern Ry. Co., 4 C. B. N. S. 296.

<sup>3</sup> Franklin v. S. E. Ry. Co., 3 H. & N. 211.

<sup>4</sup> Hetherington v. N. E. Ry. Co., 9 Q. B. D. 160.

Mental suffering or loss of society cannot be taken into the account. The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family.<sup>1</sup> The whole inquiry turning on probability, with regard to matters in their nature uncertain, the damages are very much in the discretion of the jury.<sup>2</sup> Nevertheless there are certain rules for the guidance of a jury which it will not do to overlook, because, here as elsewhere, if the verdict is so large as to show plainly that more than the legal elements of injury have been compensated, or so small as to show that these elements have not been properly compensated, the verdict will be set aside as excessive or inadequate. To understand how the matter is dealt with by the courts it is best to take, what may be regarded as a typical instance, that of the death of the father of a family when the suit is brought for the benefit of his widow or minor children. In this case they lose clearly the value of the husband and father's support, of the wife during life, and of the children during their minority, and evidence is admissible as to *all the elements* entering into the probable value of the life to the widow and next of kin.<sup>3</sup>

#### RULE.

48. *In the case of the death of the head of the family, the measure of damages is so much of what the deceased would have probably earned by his labor or have accumulated during the residue of*

<sup>1</sup> Paulmier v. Erie R. R. Co., 34 N. J. L. (5 Vr.) 151, 157; Blake v. Midland Ry. Co., 18 A. & E. (n. s.) 93.

<sup>2</sup> Railroad Co. v. Barron, 5 Wall. 90; Penn. R. R. Co. v. McCloskey, 23 Pa. St. 526.

<sup>3</sup> Tilly v. Hudson R. R. Co., 29 N. Y. 252; Balt. & O. R. R. Co. v. Wightman, 29 Gratt. 431; Pym v. Gt. N. Ry. Co., 4 B. & S. 396; Grand Trunk Ry. Co. v. Jennings, 13 App. Cas. 800.

*his life, as would have probably gone to the benefit of his family, taking into consideration his habits of living, his age, and his ability and disposition to labor and benefit them.*

#### ILLUSTRATION.

Deceased leaves no widow, and but three children, all grown up. Two sons support themselves; the daughter is married. A verdict is obtained for \$30,000, and this being set aside as excessive, the plaintiffs on a new trial recover \$27,500. This is held to be excessive, and the plaintiffs are given the option of reducing the verdict to \$15,000, or taking a new trial. The reasoning of the court is in substance as follows: *First.* As the parent owed no duty of support, and there is nothing to show "any fixed allowance or casual benefactions," the children were deprived of "no immediate pecuniary advantage." *Second.* At his death he was in business with his sons and son-in-law. His death deprived the surviving partners of the benefit of his credit, capital, skill, and expectations. But this injury is not within the statute. *Third.* It was claimed that the next of kin had a reasonable expectation of having from their father (*quod* father) service or counsel in their affairs. Considering all the circumstances of the case, compensation for this injury (if any) could not exceed a small sum without being excessive. *Fourth.* The principal basis for plaintiffs' claim was that the death of deceased put an end to accumulations which he might thereafter have made, and which might have come to the next of kin. He had accumulated about \$70,000, all of which, except \$10,000 capital placed in business, seems to be permanently invested. By his will the bulk of his property has been given to his children. As to this it is held that no account could be taken of the income derivable from investments, because these went in bulk to the children, but that in determining probable future accumulations attention should be restricted to such as would arise from the labor of deceased in his business. His receipts for two years were proved; what he expended was not proved, but was left to be inferred from his mode of life. At death his age was about fifty-six and a half, his expectation of life was sixteen

and seven-tenths years. The plaintiffs' counsel calculate that calling his income \$10,000 and his expenditure \$1,000, the present worth of his net income for life was \$27,710.32. But assuming the value of the loss of deceased's service or counsel was small, as already decided, the verdict must have assumed that the deceased would certainly continue to work, and to gain the same income down to the day of his death; that he would certainly have retained sufficient health and strength for this purpose, that he would have met with no losses, and that the next of kin would have received the benefit of the whole. As these matters are all uncertain, the verdict is plainly excessive.<sup>1</sup>

To look at the matter in another way, what are the heads of damage in cases of this kind? From the cases it appears that in an action for the death of the head of a family there may be matters of proof and heads of loss, as follows: 1. Probable duration of joint lives of husband and wife by the tables. 2. The same as to husband and each of the children. 3. Any other circumstances affecting this question, *e. g.*, health, age, &c. 4. Probability of advancement or promotion, if any. 5. Probability of accumulations, if any. 6. Property diverted from wife or children by death. 7. Support and other reasonable expectations of pecuniary benefit of wife during life. 8. Support of children during minority. 9. Reasonable expectation of benefit by children. 10. Instruction, physical, moral, and intellectual training of a father. 11. Loss of care, &c. of a husband. 12. Loss of social position, if any. 13. Funeral expenses. As to every head, the evidence must be examined to see what amount it would warrant, and whether the jury has not allowed too much or too little. It is within these limits that the case is subject to the discretion of the jury. So far as is practicable, the court tests the verdict by legal standards.

<sup>1</sup> *Demarest v. Little*, 47 N. J. L. 28.

## CHAPTER XV.

### TORTS AFFECTING RIGHTS OF PROPERTY AND CONTRACT.

CONVERSION. — Among the different common-law actions developed through *case*, out of *trespass*, two of the most important were *assumpsit* and *trover*, the former being gradually made to apply to all cases of simple contract, the latter to the trial of disputed questions of property in chattels. The name of *trover* came from the allegation that the defendant found the goods in question, and converted them to his own use. The allegation of finding soon became a mere fiction, the gist of the action became the conversion, and such it remains.

It is the object of the plaintiff in an action for conversion to obtain not the thing itself, nor damages for injury to the thing, but damages for taking it from him, which generally must be the value of the property. Ordinarily the judgment in the action is an assessment of the value of the goods, and the satisfaction of the judgment is very like the payment of the price upon a sale, and in consequence vests the property in the defendant.<sup>1</sup> As to what acts constitute conversion, who may bring the action, and when, before bringing it, demand for and refusal to return the property are necessary, it is impossible here to go into details; but it may be said generally that the plaintiff must show property, general or special, or actual possession, or the right to immediate possession; <sup>2</sup> that the action cannot be main-

<sup>1</sup> *Elliott v. Hayden*, 104 Mass. 180; *Thayer v. Murray*, 73 N. Y. 305; *Brinsmead v. Harrison*, L. R., 6 C. P. 584.

<sup>2</sup> Cooley on Torts, \*443.

tained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself, or to deprive the rightful owner of it, or has destroyed the property;<sup>1</sup> and that when defendant's original possession was lawful, it is generally necessary to make demand before bringing suit. Keeping these general principles in view, it will be found that the measure of damages depends upon the extent of pecuniary injury produced by the conversion, whatever it may be. The form of this action is important; it is essentially one in tort, to recover the value of the property converted. Trespass is also an action of tort, but does not depend upon conversion or imply change of title. Again, trespass for carrying off goods is a well recognized form of action. In trover the goods may also have been carried off; but it is not at all necessary. They may have been merely sold to a stranger. On the other hand there may often be a choice between the action of trover and an action of contract (formerly *assumpsit*), and the measure of damages will not always be the same. Thus in an action for money had and received, the plaintiff is always limited to the bounds of the *implied agreement*, but in trover his damages are measured by the *value* of the thing lost.<sup>2</sup> Exemplary damages, in an action for money had and received, could not be recovered. In trover they seem to be infrequently allowed, but on principle the jury should be allowed to give them.<sup>3</sup> Finally, in certain jurisdictions, in actions for the conversion of securities of fluctuating value, the plaintiff recovers in an action of

<sup>1</sup> *Spooner v. Holmes*, 102 Mass. 503.

<sup>2</sup> *Hunter v. Prinsep*, 10 East, 378, 391; cf. *Frothingham v. Moore*, 45 N. H. 545; *Coffey v. Nat'l Bank of Mo.*, 46 Mo. 140; *Sterns v. Low*, 2 Hill, 132.

<sup>3</sup> *Dennis v. Barber*, 6 S. & R. 420; *Thayer v. McManis*, 4 Watts, 418; *Taylor v. Morgan*, 3 Watts, 333.

conversion a higher value than that at the time of conversion. This is an exceptional rule, in conflict with that generally applied, but its existence is an illustration of the fact that the form of an action cannot be disregarded. For conversion of personal property therefore, resulting in total loss, the measure of damages is its value with interest, while, in all other cases, the most specific statement that can be made is that the damages must compensate the plaintiff for the total injury.

B., a swindler, contracts a bill of £109 for board and lodging at an inn. While there a pair of horses, wagonette, and harness arrive for B., and they are received by the innkeeper as part of B.'s property. In fact B. had bought the horses from the plaintiff, on the terms that if not paid for they should be returned to the seller. B. has not paid, and at the time of his leaving the inn, there is a bill of £22 10s. for their keep. Plaintiff now demands the property, tendering a sum of £20 for the keep of the horses; but the innkeeper refuses to give anything up. The innkeeper then sells the horses for £73, but retains possession of the wagonette and harness. The sale is an act of conversion, because an innkeeper's lien only authorizes him to detain, not to sell, and plaintiff is entitled to judgment against him for £73 and costs.<sup>1</sup>

When it is said that the measure of damages for conversion is the value of the property, the rule is limited to the case of total loss. It must be observed that while the *conversion* if established is usually total, the resulting loss depends altogether on the circumstances of the case. The property may be returned to the owner and accepted by him, meantime it may have increased or diminished in value; it may have been increased in value by the labor of the defendant; it may have been so intermingled with the property of the defendant, as to be inseparable or in-

<sup>1</sup> *Mulliner v. Florence*, 3 Q. B. D. 484. Rule 39.

distinguishable from it; consequential damages may have ensued. The result is that the rule in trover, as usually laid down, the value of the property with interest, is not a fixed rule of law.

### RULE 39.

#### ILLUSTRATIONS.

(a) In an action for conversion of a stock of goods the jury is instructed that the plaintiff is entitled to recover the retail value of the goods taken, with interest. This is error for which the judgment will be reversed; the measure is the market value, or what it would have cost to replace the goods in the market.<sup>1</sup>

(b) A horse is stolen from R. in Georgia, taken by the thief to Alabama, and there sold to H. R. recovers the horse. In an action against H. he may recover for deterioration in the horse while in his possession, but not for travelling expenses to Alabama, H. having had nothing to do with the removal of the horse.<sup>2</sup>

(c) T. hires L.'s horse to go to M. and back for a stipulated price, but goes to a different place. This is a conversion, and the hirer is liable for any damage occurring, though owing to the fault of the horse.<sup>3</sup>

(d) B. converts to his own use A.'s certificate of stock, but can make no use of it, nor of the stock represented by it, because it cannot be transferred without A.'s endorsement. The measure of damages is not the market value of the stock.<sup>4</sup>

(e) L. cuts down B.'s trees and tows them to his saw-mill. In an action for the conversion, B. recovers the value of the trees as cut, and not their value as increased by the transportation.<sup>5</sup>

(f) F. contracts with R. for the building of a vessel, and makes advances from time to time, R. giving as security a bill of sale of the ship when completed. A third person converts

<sup>1</sup> *Wehle v. Haviland*, 69 N. Y. 448.

<sup>2</sup> *Renfro v. Hughes*, 69 Ala. 581.

<sup>3</sup> *Lucas v. Trumbull*, 15 Gray, 306.

<sup>4</sup> *Daggett v. Davis*, 53 Mich. 35.

<sup>5</sup> *Beede v. Lamprey*, 64 N. H. 510.

the ship in process of construction and finishes the work. The measure of damages is the value of the ship at the time of the conversion, *i. e.*, the value as contemplated, less the money required after the date of the conversion to complete, and not her value at a subsequent time; nor can there be any recovery for the freight which F. might have earned with her.<sup>1</sup>

(g) A. without wrongful intent mines coal on B.'s land. The measure of damages is not the value of the coal as converted; but this value less the cost of the labor of mining it, together with any consequential damage in mining.<sup>2</sup>

It is in connection with the action for conversion that what is known as the rule of Higher Intermediate Value may be most conveniently explained. This rule has derived most of its importance from stock transactions, but is quite as applicable in detinue and replevin, in actions for refusal to transfer or deliver stocks, and in actions for failure to deliver goods sold when the price has been paid in advance. The rule has been stated to be that in any action where the plaintiff has been deprived by the wrongful act of the defendant of property of fluctuating value, his measure of damages should be the *highest* value he could have obtained for it between the time at which he was deprived of it, and the time of the trial. The rule was first clearly laid down in *Romaine v. Allen*,<sup>3</sup> but the New York courts by subsequent decisions<sup>4</sup> have restricted it, so that in that State the highest value is allowed only

<sup>1</sup> Reid v. Fairbanks, 13 C. B. 692.

<sup>2</sup> Forsyth v. Wells, 41 Pa. St. 291; acc. Livingstone v. Rawyards Coal Co., 5 App. Cas. 25; cf. United Merthyr Collieries Co., L. R., 15 Eq. 46. This is now the generally accepted rule, though there is much confusion in the cases, as the early rule of the common law was that the plaintiff could recover the entire value, *Martin v. Porter*, 5 M. & W. 351; and the old rule is still adhered to in some jurisdictions.

<sup>3</sup> 26 N. Y. 309.

<sup>4</sup> *Baker v. Drake*, 53 N. Y. 211; 66 N. Y. 518; *Wright v. Bank of the Metropolis*, 110 N. Y. 237, 246.

between the time of the injury and the time when the plaintiff by due diligence might have replaced himself in the market. So far as stock transactions are concerned, the New York rule has been adopted by the Supreme Court of the United States.<sup>1</sup>

As it is the object of this hand-book only to give the general principles of the subject, it may be enough here to say that the question of the time at which the value of the property of which the owner has been deprived by a tort should be estimated is independent of the form of action, and that whenever it appears with sufficient certainty that he would have derived a larger profit from the use than the interest on the money value, *e. g.*, when he had contracted to sell it at an advance, in such cases he is entitled to this gain in addition to the value.<sup>2</sup> In such cases the question resolves itself into one of certainty of proof. Thus in a leading English case<sup>3</sup> the property converted consisted of champagne already sold at an advance, and the advance was allowed for. This was not on the ground of the advance being special damages, or damages within the contemplation of the parties, but that this was really the value of which the conversion had deprived the plaintiff.

The reason why in the case of stock contracts a special rule has been introduced is chiefly this. Other articles of property are supposed to have a more or less fixed market value; stocks, on the contrary, are usually bought because it is expected that they will rise in value, and one of the commonest forms of stock contracts is that in which a broker "carries" stocks for his principal, who pays down a part of the price called a "margin" which he is to keep good if the stock falls, as requested by the broker. Now

<sup>1</sup> *Gallagher v. Jones*, 129 U. S. 193.

<sup>2</sup> *Suydam v. Jenkins*, 3 Sandf. 641.

<sup>3</sup> *France v. Gaudet*, L. R., 6 Q. B. 199.

obviously in this case if the broker converts the stock, the principal loses not only the stock but the chance of its rising. If this chance is converted into a certainty by a subsequent rise, should he be confined to the original value? If so, he not merely loses his chance, but the broker has by his wrong deprived him of the very profit which he was looking for. Hence it is said to be only reasonable to give him as damages more than the market value at the time of the conversion. As a prudent man, he will on notice of the conversion, replace himself by making a new contract; hence the rule as now established in New York.

#### RULE.

*In actions for the conversion of stocks, the measure of damages is the highest market value between the time of the injury and the time when the plaintiff might with due diligence have replaced himself in the market.*

The rule is open to several grave objections. 1. Articles other than stocks, even the chief commodities of life, fluctuate widely in value. 2. They are also constantly bought solely for speculation. 3. No one can say that the plaintiff, as a prudent man, having lost his stock by the wrongful act of his agent, would immediately engage in another speculation of the same sort. 4. There is no certainty that he would, had the conversion not taken place, have made a profit, for he might have retained the stock until it had fallen again.

In most jurisdictions the rule is not recognised. Its existence can perhaps best be explained by saying that in its present form the rule of higher intermediate value represents the efforts of the courts in the direction of minimizing the effects of what was once a rule still more opposed to principle.

RECOVERY OF SPECIFIC PERSONAL PROPERTY.—In the action for conversion, as in that of trespass, the plaintiff sues solely to recover damages for the wrong done. For the recovery of specific personal property the common law gave two forms of action, *detinue* and *replevin*. Both these are now generally replaced by a statutory action, which answers all the purposes formerly attained by either.

As the action of trover was founded upon the conversion, and judgment and satisfaction changed the title, the action of *detinue* was founded upon the detention of goods. The object was to recover the thing itself and damages for its detention. As the action, however, passed out of general use before the rules of compensation had been carefully examined, and while the whole matter of damages was more in the discretion of the jury than it now is,<sup>1</sup> it is unnecessary to consider it here, further than to observe that it had originally nothing whatever to do with *replevin*, a form of action of very remote antiquity.

*Replevin* is treated by English writers in connection with the subject of distress, and though the connection has been in this country so completely severed that we regard it now as an entirely independent remedy, it was no doubt introduced to settle the rights of parties, one of whom had distrained property of the other. The two primitive forms of distress were distress for rent, and of cattle *damage feasant*, and it is highly probable that distress in general, which is merely the taking into possession of the property of another, for the purpose of making him comply with some demand, is a survival from times when courts of justice had no existence.<sup>2</sup> Without,

<sup>1</sup> Cf. *Williams v. Archer*, 5 C. B. 318; and *Freer v. Cowles*, 44 Ala. 314.

<sup>2</sup> Longfield on Distress, 2; Maine's Early History of Institutions, ch. ix. and x.

however, going back to so remote a period we know that in the Middle Ages the seizure of the tenant's goods, and especially his cattle, which were his principal wealth, by the landlord, was a common offence, and was productive of great injustice and oppression. To meet it the writ of replevin was introduced. The word itself, *replegiari*, shows that originally there was some primary pledge; this pledge was the distress. The landlord having taken the tenant's property as a pledge or security, the law, intervening, authorized the sheriff to deliver back the property so taken, upon the owner's giving in his turn security that he would either make out the justice of the taking, or return the goods.<sup>1</sup> In process of time the replevin was severed from the distress and was extended to every sort of tortious taking, and we have as the result an action which is begun by taking the property, as to which the dispute has arisen, out of the hands of the defendant, and then giving security that the plaintiff will make his claim good, or return the property. The plaintiff's object is to obtain damages for the taking and detention. The defendant's is to recover the property, and also to get damages occasioned by the replevin itself. The defendant's demand is founded on the *legal process* sued out and prosecuted by the plaintiff.<sup>2</sup>

It is evident that replevin suits are founded wholly upon the idea of a tortious taking and detention, and that their use as a means of trying title to chattels is modern. At the time of its introduction, as a means of mitigating the severity of distrains, no one but the real owner of the property had any motive for suing out the writ. At present the action is often a mere means of trying title, in which both parties demand the property itself, together with damages for its detention. The defendant has two remedies, one in the original action, and one on the bond

<sup>1</sup> Gilbert, p. 58.

<sup>2</sup> Bruce v. Learned, 4 Mass. 614.

given by the plaintiff, though, of course, he cannot recover twice for the same elements of damages. The principles which govern the allowance of damages are substantially the same on one side or the other. Usually if the plaintiff recovers, as he has taken possession of the property, he cannot recover its value; but only damages for its detention. When, however, the property has been put out of the sheriff's reach, he recovers its value in addition, at the time of the demand made by the sheriff; in some jurisdictions, as in trover, the highest intermediate value.<sup>1</sup> On the other hand, if the defendant prevails, and the property cannot be found, or where, as in some jurisdictions, the successful defendant is allowed to elect to take the value, instead of the goods, and he does so, he also is entitled to judgment for the value. As to the time at which the value should be assessed, there is much uncertainty in the cases. If the property cannot be found, the value is taken at the time of the demand under the writ of restitution. As a general rule, as in trover, any increase of value caused by the labor of the defeated party is not included, though, if the taking is wilful, the rule is said to be the other way.<sup>2</sup>

This distinction between cases of innocent and wilful taking need not be discussed here, because where it exists it is purely arbitrary, and is founded on a notion of liability wholly at variance with that which underlies the common-law principles of damages. Of course it is independent of the form of action; if compensation is to vary according to the state of mind of the defendant, it ought to make no difference whether the suit is trespass, trover, or replevin.<sup>3</sup>

Damages for the detention are assessed to the end of

<sup>1</sup> *Tully v. Harloe*, 35 Cal. 302.

<sup>2</sup> *Heard v. James*, 49 Miss. 236.

<sup>3</sup> See further *Tuttle v. White*, 46 Mich. 485.

the time during which it lasted, *i. e.*, down to the verdict. When the property is returned, the owner recovers the value of the use during detention, but when the successful party recovers the value instead of the property, he recovers in some jurisdictions interest on the value. When the property is held for consumption or sale, he recovers interest.

#### RULE.

49. *In actions for the recovery of specific personal property, the prevailing party is entitled to judgment for the property itself, or its value, together with damages for its detention, including either the value of its use, or interest.*

#### ILLUSTRATIONS.

(a) A sheriff having levied on goods, A. replevies them, but fails in proving title. The sheriff, having the right by statute, elects to take judgment for the value of the goods. The value which he recovers is that at the time of the replevin.<sup>1</sup>

(b) Action is brought to recover possession of a horse. The horse has been from the time of the replevin to the time of trial in the possession of plaintiff, but the title is found to be in defendant. The value of the horse is \$75, and the value of its use during detention, \$75. For the same period legal interest would have been \$15.31. The measure of damages is the value of the use.<sup>2</sup>

(c) The inventor of a new patented machine for the purpose of inserting and fastening rivets in the joints of umbrella ribs and stretchers, desiring to introduce it into general use delivers a number of them to the defendant, giving him an option to

<sup>1</sup> *Suydam v. Jenkins*, 3 Sandf. 641. This illustration is given because, though the question of the time at which the value is to be taken in replevin is not by any means in a settled condition, the learned opinion of Duer, J., going over the whole ground of the measure of damages in torts affecting property interests, deserves careful study.

<sup>2</sup> *Allen v. Fox*, 51 N. Y. 562.

return or purchase. He neglects to return, and does not purchase. The measure of damages is interest on the value as found by the jury.<sup>1</sup>

---

**ACTIONS AGAINST OFFICERS.** — As a general rule all ministerial officers are liable for any damages caused by their negligence or malfeasance: but there are two different species of liability. First, the officer who, in the course of executing process, unwarrantably injures any one in his person or property is liable like any other trespasser, and the measure of damages will be usually the same as in an ordinary case of trespass. In cases of this sort the rule of exemplary damages is often stringently applied. Second, the officer who undertakes to execute process at the request of a party is liable (in an action on the case) for any loss suffered through his negligence or wrong. In these cases the actual pecuniary injury is the measure. A third species of action exists for this kind of injury against the sureties on the official bond of the officer, and generally the measure of damages is not affected by the question whether it is brought against the officer or upon the bond.

With reference to the measure of damages there is a difference between mesne process, or such process as is intended to provide security in case the plaintiff prevails, and final process. When a sheriff is directed to arrest or attach on mesne process, the claim is evidently quite undetermined; but when final process is issued it is to satisfy a judgment, and the failure of the officer to execute, provided the defendant has property on which levy could have been made, necessarily produces a total loss. It has been argued that the action against the officer ought not to be maintained if the judgment is still collectible; but the answer is that if this were true the second

<sup>1</sup> Redmond v. Am. Mfg. Co., 121 N. Y. 415.

execution would admit of the same defence, and so on *ad infinitum*.<sup>1</sup> The true rule is that the officer can only relieve himself of his liability by showing that the defendant in execution had no property on which levy could be made, or some other matter of justification. In cases of mesne process the question may arise during the suit, or at its termination. The plaintiff, having recovered judgment, finds that there is no legal attachment of the property which he supposed to be attached and which would have been his security. Here all the circumstances must be inquired into, and if there has been a considerable lapse of time between the issue of the writ and the judgment, there are usually many circumstances to be inquired into; but the actual injury sustained is still the real measure, and if it appear that but for the action of the officer the plaintiff would have had his debt, he recovers the total amount. If the question arises before the termination of the suit, the fact of liability must be established, as also the fact that but for the officer's neglect the plaintiff would have had security. At the present time arrest and imprisonment as a security for debt have fallen so much into disuse that it is hardly necessary to speak of them. Formerly it was often a difficult question to say whether, in cases of escape or rescue, the plaintiff had lost anything or not; now the question turns upon the value to the plaintiff of the officer's taking property into his possession as security. The defence may in all these cases reduce the damages by showing that the original liability did not exist, that with all proper diligence the officer could not levy or attach, that the defendant was insolvent, that the plaintiff himself was the cause of the failure, etc., etc.

#### RULES 39-44.

#### ILLUSTRATIONS.

- (a) Officers enter B.'s house with violence and levy on execu-

<sup>1</sup> Ledyard v. Jones, 3 Seld. 550.

tion without a legal warrant. B. pays under protest £20 as a *bonus*, and £200, the amount on the writ. A jury gives as damages the amount so paid and £500 more. This verdict is not excessive.<sup>1</sup>

(b) S., an officer, levies upon certain horses claimed by A., under an execution against a third party. It appears that the latter purchased the horses from A. under an arrangement by which they were to remain A.'s property till fully paid for. Part payment had been made. The court directs the jury that if they find for the plaintiff they are to give him "the value of the property taken and interest," and such further amount as they "think him entitled to demand," if any. This instruction is wrong. The plaintiff can only recover an amount commensurate with his interest in the property, and there are no facts calling for exemplary damages.<sup>2</sup>

(c) An officer makes a levy on land which turns out to be void. The total value of the land is \$650, but it is mortgaged for \$516.34. In an action against the officer the measure of damages is the difference between the two sums.<sup>3</sup>

(d) An officer fails to attach. The suit having terminated the measure of damages is the amount of the judgment, provided the plaintiff obtained one, or so much thereof as the value of the property would have been sufficient to satisfy.<sup>4</sup>

(e) A. holds B.'s note for \$113.41, and brings suit directing an officer to attach. B. has at the time property which might be attached, but subsequently becomes insolvent. The officer makes no attachment, but gets B. to send \$50 in part payment. A.'s measure of damages against the officer is the balance ascertained to be due on the note.<sup>5</sup>

(f) A sheriff makes a false return of *nulla bona*. The measure of damages is the amount directed by the execution to be collected.<sup>6</sup>

<sup>1</sup> Duke of Brunswick v. Slowman, 8 C. B. 317.

<sup>2</sup> Rose v. Story, 1 Pa. St. 190.

<sup>3</sup> Parker v. Peabody, 56 Vt. 221.

<sup>4</sup> Perkins v. Pitman, 34 N. H. 261.

<sup>5</sup> Smith v. Judkins, 60 N. H. 127.

<sup>6</sup> Bacon v. Cropsey, 3 Seld. 195.

**INTERFERENCE WITH REAL PROPERTY.** — Where rights of ownership in real property are infringed, it may be laid down without exception that any interference with them will give an action and a right to nominal damages, even if no physical damage be caused. Originally, whenever the plaintiff could show possession of the soil itself, the action was trespass. If he could only show ownership of an incorporeal hereditament (*i. e.*, of an exclusive right to a limited user of the land in a particular way, as by a right of way over it), he was entitled to an action on the case. The distinctions between these forms of action having been swept away by the modern systems of pleading, his right is practically the same in both cases. It rests on the ground that by continued adverse user or possession, the defendant could after a certain lapse of time acquire title to the property.<sup>1</sup> But an action on the case would lie, not merely for damage to incorporeal hereditaments, but for any disturbance of the enjoyment of real property not by direct entry. Of such actions on the case, that for nuisance is the most clearly defined division. Another very ancient action by means of which interference with real property is redressed is *waste*, in which the person entitled to the reversion recovers damages against the temporary possessor, as for instance a life-tenant. In all these cases, the nature of the action has little if anything to do with the question of damages. The plaintiff recovers (1) according to the nature of his right; (2) according to the permanent or temporary character of the injury; (3) according to the actual elements of injury proved. Circumstances of aggravation or mitigation may affect the result, and exemplary damages in extreme cases are given.

In all cases of interference with real property, before the measure of damages can be ascertained, a prelimi-

<sup>1</sup> *Williams v. Esling*, 4 Barr, 486; *Dougherty v. Stepp*, 1 Dev. & Bat. L. 371.

nary question arises as to whether the cause of action is such that the damages are to be assessed once for all, or whether it is such that it gives rise to successive actions. In the case of nuisances it is well settled that they are continuing injuries, and give rise to actions from day to day, until they are abated. Nevertheless, when, as in the case of erection of public works, they cannot be abated, the injury is often treated as permanent, and damages assessed once for all. Owing to the great variety of rights in real property, and also to the fact that in many cases the question arises not from a single invasion of right, but from a conflict between the inconsistent rights of adjoining owners, the courts have only been able to lay down rules which by their extreme generality illustrate clearly the difficulty of formulating specific rules. Four points are to be noticed : 1. The constant resort to the rule of avoidable consequences. 2. The fact that there may be a recovery (a) for a permanent diminution of value, or (b) for a temporary loss of the use. 3. That there cannot be a recovery for both at the same time. 4. That the extent of plaintiff's title is always important.

#### RULE.

50. *For interference with real property the measure of compensation is the extent of the injury to the plaintiff's right. If the injury is of a permanent nature, the measure is the diminution of the value of the property; otherwise, the diminution in rental value. Whenever the expense of making the injury good is less than the diminution in value, such expense becomes the measure of damages.*<sup>1</sup>

<sup>1</sup> This results from the rule of avoidable consequences, discussed in Ch. VI.

## ILLUSTRATIONS.

(a) The action is by a landlord of demised premises for injury to his reversionary interests in pulling down a house. The measure of damages is the diminution in the market value of the property.<sup>1</sup>

(b) The action is for the destruction of a dam. The damages include the value of the water privilege from the time of injury to the time when with reasonable diligence it might have been rebuilt.<sup>2</sup>

(c) The injury is from the use of adjoining premises as an ice-house. Plaintiffs prove loss of rental value to time of trial, and also permanent depreciation. The admission of evidence on the latter head is error. The only possible head of damage in addition to the first is that of the amount necessary for such repairs as would guard against a recurrence of this injury.<sup>3</sup>

(d) The injury is by flowage. The measure of damages is the value of the standing grass totally destroyed, and the depreciation in the remainder.<sup>4</sup>

(e) Property-owners have the right to lateral support from the adjoining land, for the soil in its natural state; the right does not extend to buildings. A. builds a house on his own land within two feet of the boundary line. The adjoining owner digs so deep into his own land as to endanger the house, and A. is obliged to leave it and take it down. The measure of damages is only the loss caused by the falling of his natural soil into the pit.<sup>5</sup>

---

NUISANCES. — A nuisance is a peculiar species of interference with the enjoyment of real property rights, which consists in the user of property otherwise lawful, but in

<sup>1</sup> *Hosking v. Phillips*, 3 Ex. 166.

<sup>2</sup> *Whipple v. Wanskuck Co.*, 12 R. I. 321 (rule of avoidable consequences).

<sup>3</sup> *Barrick v. Schifferdecker*, 123 N. Y. 52.

<sup>4</sup> *Folsom v. Apple R. L. D. Co.*, 41 Wis. 602.

<sup>5</sup> *Thurston v. Hancock*, 12 Mass. 220; acc. *Gilmore v. Driscoll*, 122 Mass. 199.

such a way as to diminish the value of the property of others or injuriously affect them in some unlawful way. The measure of damages is affected by the fact that nuisances may be abated and enjoined, and are therefore not regarded in law as permanent; but as continuing wrongs for which an action lies *de die in diem*. The peculiarity of an action to recover damages for a nuisance is that some special damage to the plaintiff is the gist of the action; the general injury created by the nuisance, and which is ground for an indictment, does not concern him at all. In all cases of nuisance the plaintiff must substantiate three things: 1. He must show a particular injury to himself, beyond that suffered by the public. 2. The injury must not be remote. 3. It must be substantial, not fleeting or evanescent.<sup>1</sup> In *Wesson v. Washburn Iron Co.*,<sup>2</sup> the law in regard to nuisances is thus laid down by Bigelow, C. J. "When the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance."<sup>3</sup>

It is sometimes said to be a rule that to recover damages for a nuisance, the damages must be direct, and not consequential. But this is merely an illustration of a loose use of the term "consequential," as if it had the same sig-

<sup>1</sup> *Benjamin v. Storr*, L. R., 9 C. P. 400, 407; *Fritz v. Hobson*, 14 Ch. D. 542, 556.

<sup>2</sup> 13 All. 95.

<sup>3</sup> Page 103.

nification as remote ; what is really meant is that the rule of proximate cause applies, and that the damages must not be remote. The rule is laid down by Brett, J., in *Benjamin v. Storr*,<sup>1</sup> and the decision speaks for itself. The plaintiff keeps a coffee-house in a narrow street, and the defendants carry on business in the neighborhood in such a way as to obstruct the access to the shop, and also the light and air, with vans and horses. Here the direct injury is obstruction of light, air, and access. But under an averment that the premises have been rendered "unhealthy and incommodious," plaintiff is allowed to give evidence of a stench arising from the staling of the horses. Such an injury as this falls under the head of recoverable, consequential damages, as distinguished on the one hand from direct, and on the other from remote, damages.

A distinction with regard to the measure of damages is suggested in this case between cases of property injured under the power of eminent domain and cases of nuisance causing particular damage. In the former case, it is said, unless real property has been actually damaged or injured, no cause of action exists, and consequently to recover for loss of business, the property owner must first show this, while in case of a nuisance the plaintiff can recover for such loss without showing any damage to property. But the distinction is not usually of importance, for the particular damage which gives the right of action for a nuisance is almost always caused *through* injury to property of some sort, and this seems to have been the nature of the damage in the case just cited. The rights to light, air, and access are all incorporeal hereditaments, and it is through its effects on these alone the nuisance works injury.

The question of nuisance frequently arises in cases of obstruction to highways. Here the obstruction may create a public nuisance, for it may interfere with the

<sup>1</sup> L. R., 9 C. P. 400, 407.

common use of the highway; but the owner's right of access is something quite different from this (and the same thing may be said of the whole body of his rights in the use of his abutting premises in their relations to the highway), and consequently, if these private rights are infringed he suffers a particular damage.<sup>1</sup>

#### RULE.

51. *To maintain an action for a nuisance, the plaintiff must allege and prove some special damage to himself.*

#### ILLUSTRATIONS.

(a) A riparian owner, proprietor of a saw-mill, allows sawdust and other refuse to fall into the water, and accumulate in masses, which are carried by the stream in front of a lower owner's boat-house and wharf, making the water offensive, and producing explosions from the gas generated underneath the surface. This is special damage.<sup>2</sup>

(b) A. wrongfully creates a public nuisance by obstructing a public navigable creek. B., who is navigating his barges along it, is prevented by this obstruction, and is compelled to convey his goods overland, and thus put to trouble and expense. This is special damage for which an action will lie.<sup>3</sup>

(c) A common nuisance is created by placing obstructions in a highway. A person returning over the way with a loaded team is compelled to go back and get to his house by another road, a distance of about two miles. A verdict for nominal damages will be sustained.<sup>4</sup>

#### RULE.

52. *In an action for a nuisance, the measure of damages is the total amount of injury to the date of the writ.*

<sup>1</sup> Fritz v. Hobson, 14 Ch. D. 542; Milhau v. Sharp, 27 N. Y. 611.

<sup>2</sup> Booth v. Ratté, 15 App. Cas. 188.

<sup>3</sup> Rose v. Miles, 4 M. & S. 101.

<sup>4</sup> Brown v. Watson, 47 Me. 161.

## ILLUSTRATIONS.

(a) A nuisance is created by placing on the plaintiff's land something which can, and ought to be removed. The plaintiff can only recover damages to the date of the writ.<sup>1</sup>

(b) A railroad company erects a roundhouse near a church, and interrupts the services by noise, smoke, &c. The damages include the compensation for discomfort and annoyance in the use of the property as a church, even though the market value be not depreciated.<sup>2</sup>

---

DECEIT, FRAUD, CONSPIRACY. — In actions at law for *deceit, fraud, or conspiracy* (the principle applies to the numerous species of actions in which the plaintiff's claim rests in deception of some kind practised by the defendant), it was early laid down that neither damage without fraud, nor fraud without damage is enough. Both must concur.<sup>3</sup> The duty to tell the truth, unlike the duty not to invade the rights of personal security or personal liberty, is recognized by the law only when it becomes productive of injury, either substantial or to a legal right. A declaration charging two persons with falsely, maliciously, wrongfully, vexatiously, deceitfully, and without reasonable and probable cause, conspiring together to commence, and commencing and prosecuting an action in the name of a third person, but for defendant's own benefit, is defective; it fails to show damage to the plaintiff.<sup>4</sup>

A will is made in A.'s favor; B. and C. conspire together and induce the testator to revoke it, by means of fraud. A. cannot maintain an action, because, the will

<sup>1</sup> *Cumberland & Oxford Canal Co. v. Hitchings*, 65 Me. 140.

<sup>2</sup> *Balt. & P. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 335.

<sup>3</sup> *Baily v. Merrell*, 3 Bulstr. 94: A. cheats B. in weighing butter, but afterwards pays enough in settlement to cover the price of the actual quantity. B. can no longer maintain an action. *Nye v. Merriam*, 35 Vt. 438.

<sup>4</sup> *Cotterell v. Jones*, 11 C. B. 713.

being revocable, no legal *right* of his is interfered with.<sup>1</sup> Of course the rule of proximate cause applies here as elsewhere. A mortgagee of land promises the mortgagor gratuitously not to foreclose under a power of sale. Afterwards the mortgagee is induced by the defendants (who falsely represent that the mortgagor desires it) to assign the mortgage to a third person. By this means the defendants cause the mortgage to be foreclosed, but the mortgagor is held to have no right of action, because the proximate cause of the loss is not the deception, but the foreclosure. There being no consideration for the promise of the mortgagee, there was nothing to prevent him or any assignee from foreclosing, and it cannot be said to be any invasion of the plaintiff's legal rights to deprive him of the benefit of this gratuitous undertaking.<sup>2</sup>

In many cases the connection of cause and effect seems very probable, but is not considered by the court as sufficiently certain. Thus when the plaintiff charges that he was induced by falsehood to refrain from carrying into effect an intention to attach, as a result of which another creditor has taken the property, he cannot maintain an action; there is no certainty that he would have attached.<sup>3</sup>

**ACTION FOR POSSESSION OF REAL PROPERTY.** — Almost the whole body of modern common-law remedies, as has been seen, has a single though remote origin in the writ of trespass. From this, in the first place, came the action on the case, providing remedies for all novel forms of interference with person or property, other than violent

<sup>1</sup> *Hutchins v. Hutchins*, 7 Hill, 104.

<sup>2</sup> *Randall v. Hazelton*, 12 All. 412. Cf. *Tunbridge Wells Dippers Case*, 2 Wils. 414, where the loss was the loss of a gratuity; but this was the direct consequence of a disturbance in the *right* of employment.

<sup>3</sup> *Bradley v. Fuller*, 118 Mass. 239.

injuries; and later, as separate species of actions on the case, *assumpsit*, moulded by the courts into a proceeding for the redress of breaches of contract in general, and *trover*, developed by them into the modern action for trial of title to personal property. Turning now to real property, we find that the same action on the case has, by a very peculiar process, developed the modern action of ejectment, by means of which title to real property is tried.

Originally the feudal law provided a great number of writs for the recovery of different estates in land. But owing to a variety of causes these writs, with the progress of society, became less and less adapted to the purpose they were introduced to serve. The pleading in real actions became more and more technical, and the abuses of justice more and more marked, and as Parliament did not in this case interfere, it was left to the bar and the courts to invent some new method more simple and equitable than the old. This was done in process of time by the development of a particular species of action of trespass into an action for the trial of all titles.

The writ of *ejectione firmæ* was a writ of trespass, designed to give a tenant for a term of years an action against any one who ejected him. As in any other action of trespass, he recovered only damages. Indeed, originally the idea of anything but damages being recovered seems to have been out of the question, for the law did not regard a term of years as an estate in land.<sup>1</sup> The tenant held under a covenant made by the lord, and for a breach of this covenant by the lessor he could obtain a writ of covenant, by means of which, it is said, the lessor could be compelled to restore him.<sup>2</sup> However this may have been, against a stranger he could only recover damages. When an estate for years began to be recognized as an

<sup>1</sup> Washb. Real Prop. \*291 (4th ed. 435).

<sup>2</sup> 3 Blackst. Com. 156.

interest in land, the courts appear to have injected into the action a judgment to recover the term, and a writ of possession.<sup>1</sup> The action of ejectment thus introduced rapidly supplanted the old real actions, and by the time of Elizabeth was firmly established as the common means of trying title.

As at first established it was in no respect fictitious. The first step is an actual entry on the land by the person claiming title. He, then being in possession, leases it for a term of years; the lessee then remains on the premises till he is ejected, when he becomes entitled to his action of ejectment and recovers back his term and damages. The four requisites to a recovery are, *title*, *lease*, *entry*, and *ouster*, but for some reason, now difficult to understand, the ouster might be made by anybody. But the action in this form led to abuses. Any ouster, even by what was called a *casual ejector*, being deemed enough to support the return, the door was open to collusive ousters; nor was the action yet adapted for the questions of trial of *title* alone. For this purpose a new feature was engrafted upon it in the time of the Protectorate. Without going into details the effect of the change was that the claimant of the title delivered to the tenant in possession a fictitious declaration in ejectment, in which John Doe, or Goodtitle, and Richard Roe, or Badtitle, were the imaginary plaintiff and defendant, the plaintiff declaring on a fictitious lease from the real claimant for a

<sup>1</sup> The Common Pleas had exclusive jurisdiction of real actions, and one reason for these changes was no doubt the desire of the King's Bench and the Exchequer to draw controversies about land into their own hands. Another was the fact that Equity was beginning to grant specific performance against lessors, and decree perpetual injunctions against strangers. "This, drawing the business into the courts of equity, induced the courts of law to resolve, that they should recover the land itself by an *habere facias possessionem*." Gilbert on Eject. pp. 3, 4.

term of years, and alleging an ouster by defendant. The title to the action therefore was John Doe on the demise of A. v. Richard Roe. To the declaration was annexed a notice to B. to come into court and defend. The court now compelled B. on his appearing, to agree to confess at the trial the lease, entry, and ouster (all fictions), and to rely solely on his title. The action thus became a suit between the real claimant and the tenant, to establish the right to the possession of the land. In it, however, any substantial recovery of damages ceased to be possible, the plaintiff being a fictitious person, and they now became nominal. To recover the injury caused meantime, another action was necessary, and for this the action of trespass for mesne profits, in which the real claimant recovered the value of the rents and profits while kept out of possession, was introduced. In this the plaintiff recovered not only the mesne profits, but damages for the eviction as well.<sup>1</sup>

Since the beginning of this century, the action of ejectment and the actions for mesne profits have been generally done away with by legislative enactment, and in their place a statutory action exists which covers both. In it there are no fictions, the real claimant sues the real defendant, and if successful recovers the land, mesne profits, and also damages, if any. In some American jurisdictions the action of ejectment never obtained any foothold. In the New England States, a real writ, the writ of entry, has always been used for the purpose of trying title; in one or two others the action of trespass to try title has answered the same end. But these actions now resemble essentially the statutory action above described, and the general principles governing the measure of recovery are the same in all jurisdictions.

Independently of statutory provisions the claims for

<sup>1</sup> Goodtitle v. Tombs, 3 Wils. 118.

damages and for mesne profits are regarded in some jurisdictions as distinct causes of action, so that, though joined in one action, they must be separately set up.<sup>1</sup>

The fundamental distinction between the two must always be borne in mind. So far as the plaintiff claims mesne profits only, the action is merely to recover the annual value of the land. So far as it is an ordinary action of trespass *vi et armis*, the rules governing the measure of damages are the same as in any other suit for damages. Every circumstance of aggravation or mitigation may be gone into.<sup>2</sup>

In England the plaintiff recovers in the action for mesne profits the costs of the ejectment suit.<sup>3</sup> In this country whether he recovers them in the ejectment suit or in the action for mesne profits, is probably a matter of statutory regulation.<sup>4</sup> As a general rule, the occupant holding under belief of title is allowed to reduce the recovery to the extent of beneficial improvements made in good faith. This is no doubt on the ground that the actual injury to the plaintiff is so much loss. This matter has been already considered under the head of Benefits.<sup>5</sup> The recovery of the expenses of litigation in the ejectment suit has been attempted in the action for mesne profits, and in an English case the plaintiff was allowed to recover as damages such expenses incurred by him in a court of error in reversing an ejectment judgment,<sup>6</sup> but this, as explained in a subsequent case,<sup>7</sup> was because at that time a court of error could not award costs. In one case in

<sup>1</sup> Cf. *Larned v. Hudson*, 57 N. Y. 151; and *Clason v. Baldwin*, 129 N. Y. 183.

<sup>2</sup> For these rules see preceding chapter.

<sup>3</sup> *Doe v. Filliter*, 13 M. & W. 47.

<sup>4</sup> *Hunt v. O'Neill*, 44 N. J. L. 564.

<sup>5</sup> See Chap. IX.

<sup>6</sup> *Nowell v. Roake*, 7 B. & C. 404.

<sup>7</sup> *Doe v. Filliter*, 13 M. & W. 47.

this country<sup>1</sup> it has been held that counsel fees were recoverable, but the court cited no authority, and the rule is everywhere clearly the other way.<sup>2</sup> There is no difference as to the allowance of counsel fees, between ejectment and any other action.<sup>3</sup>

With regard to interest, the cases often speak of interest being allowable by the jury in a proper case.<sup>4</sup> Possibly the ground of this rule was that in actions for *rent* in arrears, the early remedy was a summary one, by distress.<sup>5</sup> If so, the reason seems a bad one, as there was no summary way to recover mesne profits. At the present day, in equitable proceedings where the value of use and occupation is recovered, interest is allowed as a matter of course, and no reason is perceived why, in this country at least, the plaintiff should not in all cases be allowed interest. Without it he certainly does not receive compensation.

#### RULE.

53. *In the action for mesne profits the measure of damages is the net value of the use of the land during the period of eviction. The jury may give interest with proper rests, extending back by virtue of the statute of limitations only six years, and never beyond the time when the plaintiff acquired title. The defendant, if an occupant under belief of title, may reduce these damages by proof of reasonable expenditure for improvements, and for any necessary expenses.*

<sup>1</sup> Doe v. Perkins, 8 B. Mon. 198.

<sup>2</sup> Herreschoff v. Tripp, 15 R. I. 92; Doe v. Filliter, 13 M. & W. 47.  
See Chapter on Expenses of Litigation.

<sup>3</sup> Herreschoff v. Tripp, 15 R. I. 92.

<sup>4</sup> Vandervoort v. Gould, 36 N. Y. 639.

<sup>5</sup> Bolling v. Lersner, 26 Gratt. 36, 64.

## ILLUSTRATIONS.

(a) The property is a ferry. The measure of recovery is the net profits.<sup>1</sup>

(b) Defendant's counsel asks the court to charge that the plaintiff is not entitled to any damages except from the time when he acquired title. For failure to grant the request defendant is entitled to a new trial.<sup>2</sup>

(c) A. recovers in ejectment. He is entitled to damages from the withholding of the land up to the date of its recovery, and is not limited by the date of bringing his action.<sup>3</sup>

(d) The land is unfenced prairie, yielding nothing of any kind. The plaintiff can recover nothing as mesne profits.<sup>4</sup>

(e) It appears that a mining property was leased by defendant for \$2,000 a year and a royalty. \$2,000 was received under the lease, but no ore was taken out, while defendant, being evicted by plaintiff, became liable to the lessee in damages. The \$2,000 forms no basis for establishing the rental value.<sup>5</sup>

(f) Defendants make valuable improvements consisting of necessary mining machinery, and act in good faith in working the mines. They are chargeable only with the value of the ore in place, and may show the improvements to be a full compensation for the value of the use.<sup>6</sup>

(g) Plaintiff owns a leasehold interest in the rear of a city lot. Defendant owning a similar interest in the front takes possession of the whole, having knowledge of plaintiff's rights. The proper method of ascertaining mesne profits is to ascertain the rental value of the whole and apportion it, and allow nothing for improvements.<sup>7</sup>

(h) Mesne profits consist of the net rents after deducting all

<sup>1</sup> *Averett v. Kendrick*, 20 Ga. 523.

<sup>2</sup> *Danziger v. Boyd*, 54 N. Y. Super. 365.

<sup>3</sup> *Danziger v. Boyd*, 120 N. Y. 628.

<sup>4</sup> *Griffey v. Kennard*, 24 Neb. 174.

<sup>5</sup> *Kille v. Ege*, 82 Pa. St. 102.

<sup>6</sup> *Ege v. Kille*, 84 Pa. St. 333; so of improving oil lands by sinking an oil well. *Phillips v. Coast*, 130 Pa. St. 572.

<sup>7</sup> *Woodhull v. Rosenthal*, 61 N. Y. 382.

necessary repairs and taxes, or the net rental value, or the value of the use and occupation.<sup>1</sup>

(i) The rents in a city are by general custom payable quarterly. A referee in ascertaining the value of the mesne profits computes interest from the expiration of each quarter day. The plaintiff is entitled to judgment on this basis.<sup>2</sup>

---

INTERFERENCE WITH CONTRACT.—Besides personal rights, and the rights of property, torts may affect ordinary rights of contract. Where A. has made a contract with B. and C. interferes with B.'s performance of it, by persuading the latter to break it, does this give A. a right of action in tort against C., and if so, what would be the measure of damages? The answer is that it does give an action, and that the damages must necessarily depend upon the nature of the contract, and the extent of the injury. This sort of injury is called *malicious* interference with contract, but it is clear that the malice is simply the wrong implied in doing an unlawful act, which consists in persuading one to break a contract with another.<sup>3</sup> The contractor remains of course liable; the damages are for the tort. Such actions must be very rare, for several reasons. In the first place, it has been already explained that the law usually regards the human will as free, and hence, in ordinary cases, when one who has entered into a contract breaks it, this is supposed to be his voluntary act, not the act of some third person. If it is held that a contract has been broken through the persuasion of a third party, there must be two liabilities for this, and if the contract be totally abandoned, it would seem as if the plaintiff would

<sup>1</sup> Wallace v. Berdell, 101 N. Y. 13.

<sup>2</sup> Jackson v. Wood, 24 Wend. 443; cf. Hodgkins v. Price, 141 Mass. 162.

<sup>3</sup> Temperton v. Russell (1893), 1 Q. B. D. 715; Walker v. Cronin, 107 Mass. 555.

have the right to a double recovery ; for how could a recovery in tort against A. bar a recovery in contract against B. for a totally different cause of action? But a more serious objection (if this be one) in most cases would be the difficulty of proof. It may be easy to prove that A. attempted to persuade B. to break his contract ; but the mere fact that this is followed by a breach would surely not be enough. The only tolerably clear case would seem to be when, from the control or authority that one person has over another, the latter is not really free. Such is the case of a species of coercion or duress exerted by a Trades Union over its members or over contractors, and here the proof may be made out.<sup>1</sup>

<sup>1</sup> See cases cited above.

## CHAPTER XVI.

### DAMAGES IN CONTRACT.

THE line of division which separates contract from tort has been already noted. The fundamental distinction is that in one case the action is brought to recover for the loss of the benefit of the *contract*, in the other to recover damages for an *act* independent of contract. What this act really is we cannot generally understand until every circumstance of aggravation or mitigation has been gone into; while in the case of a contract we merely need to know whether there has been a breach. The motive of a defendant in contract is immaterial, not only as to liability, but also as to damages; and exemplary damages cannot be recovered.<sup>1</sup> As a rule pecuniary elements of injury only are considered.

Actions of contract are divided into actions on express contract, and actions on implied contract. In the former case there is an express stipulation of some kind, oral or written; in the latter, when one has performed services or furnished money's worth to another, at his request, the law is said to *imply* an undertaking to pay for them.

To understand the different ways in which the law gives compensation in the case of contracts, it is necessary to bear in mind that at common law *assumpsit* was a general form of action for both express and implied contracts; if the contract sued upon was express, the *assumpsit* was said to be *special*; if the liability were merely implied by law, it was *general*. In a declaration in *assumpsit*, the

<sup>1</sup> Grand Tower Co v. Phillips, 23 Wall. 471.

pleader stated his case in the form of "counts," and of these there were several, founded on implied liability of such ordinary occurrence that they came to be known, and indeed still are known, wherever any trace of common-law pleading remains, as the "common counts;" viz., for *goods sold, work done, money lent, money paid, money had and received, &c.* A declaration might and still may contain both special and general counts, — that is, it may contain a statement of the cause of action as founded upon an express contract, coupled with a statement of it as founded upon an implied contract. In the two cases the measure of damages will usually be different, and in some cases the plaintiff has the right to elect on which he will stand.

The measure of damages in an action for breach of contract depends mainly on the value of a promise, and the fundamental rule is that the plaintiff recovers the net benefit of having the contract performed. He is to be put into the same situation as if the contract had been performed. The net benefit means the total sum of benefits, less expenses. His loss is not measured by the consideration, because he would have parted with that had the contract been performed. In the same way ordinarily he cannot recover the expense of preparation to perform, as he would have been at such expense in any case. But this rule is limited by another: that if the gains or benefits of the contract are incapable of proof, as being too uncertain or speculative, he may prove what he has *lost* through the breach of contract.

Again, the contract may have been entered into with a view to a special purpose, within the contemplation of the parties, and for this purpose the plaintiff may have been put to expense. In this case he will be entitled to damages for this loss, *in addition* to the benefit of the contract. But these are consequential damages, and do

not resemble expenditures incurred as part of the price given for the benefit of the contract. These distinctions need to be carefully noted. To put the matter in another way: throughout the whole range of contract the rule of Certainty and the rule in *Hadley v. Baxendale* are constantly in force, and both will be found to embody essential tests of the measure of recovery. Neither, however, takes explicit notice of a fundamental difficulty, — that the loss may be of two entirely different kinds: loss occasioned (*e. g.*, losses incurred in preparing to perform), and gain prevented (*i. e.*, the benefit or advantage to be derived from the contract, profits, etc.). Sometimes the two coincide, as when the loss is itself the benefit of the contract. Sometimes one has nothing to do with the other; generally one excludes the other. The following may put the matter in a clearer light: —

#### RULES.

54. *For breach of contract the measure of damages is the net value of the contract.*
55. *Where this is incapable of proof, the consideration or expenses of preparation to perform may be recovered.*
56. *Consequential damages are recoverable only, if within the contemplation of the parties.*

#### ILLUSTRATIONS.

(a) The contract is to furnish a hall for the performance of a theatrical company, the plaintiff to have half the gross receipts. On breach, the amount of profits which the plaintiff could have made are not susceptible of proof; his measure of damages is the amount of his expenses legitimately incurred in preparing for the performance of the contract.<sup>1</sup>

(b) The contract is to improve a harbor, and requires exten-

<sup>1</sup> *Bernstein v. Meech*, 130 N. Y. 354.

sive preparatory expenditure. The plaintiff, on being prevented from performing his contract, claims to recover \$33,192.90 for these, and also that as by an expenditure of \$10,000 more he would have become entitled to the full contract price, he should be allowed \$8807.10 in addition. It does not appear that he could certainly have made any profit. His measure of damages is the sum spent in preparing to perform.<sup>1</sup>

(c) M. agrees to procure and deliver marble for a public building, to be paid in instalments as the work progresses. The contract having been partly performed, the defendants refuse to go on. The measure of damages, in respect to the part of the work remaining unperformed is the difference between what the performance would have cost, and the contract price, *i. e.*, the profits of the bargain.<sup>2</sup>

(d) A. leases premises to B., knowing that he means to occupy them as a drug shop. Before the time for taking possession, B. has fixtures for the shop made. The lease contains a covenant for quiet enjoyment; but B. cannot obtain possession, the tenant in possession having previously got a lease from A. B. sells the fixtures, obtaining less than cost, and having also purchased a perishable stock of goods (which purchase, however, was not necessary), is compelled to sell these at a loss. In this case the ordinary measure of damage would be the difference between the rent reserved and the actual rental value of the premises for the term. But A. may also recover the loss on the fixtures, though not on the drugs, for the defendant could not have anticipated it.<sup>3</sup>

With regard to implied contracts the question of damages presents itself in several different aspects: 1. Where there has been an express contract, but the consideration has failed. 2. Where there is no express contract what-

<sup>1</sup> *United States v. Behan*, 110 U. S. 338. In this case it might be supposed from the language of the court that, had he proved the profits, he could have recovered under both heads; but if he had been allowed to do so, he would have got back not only the greater part of the consideration, but the profits also.

<sup>2</sup> *Masterton v. The Mayor of Brooklyn*, 7 Hill, 61.

<sup>3</sup> *Friedland v. Myers*, 139 N. Y. 432.

ever. 3. Where there has been a part performance of an express contract. Again, in the latter case the plaintiff may or may not be in default.

In the first case the contract is on its face a contract for a valuable consideration; but the consideration may wholly fail, *e. g.*, an article sold may turn out to be wholly valueless; or it may have been originally good, but before the contract is executed may have become worthless. Here the party who has parted with the consideration may return the property and recover back the money paid; and the measure of damages is said to be the amount of money paid, with interest.<sup>1</sup> The original express contract having come to an end, the relation of the parties is simply that one has received from the other money for which he has given no return; hence the law implies a promise to repay. The case is really that of a breach of implied contract to pay money. The suit at common law was in general *assumpsit*.

#### RULE.

57. *Where, on total failure of consideration, the party entitled to the benefit of a contract rescinds, the measure of damages is the consideration, with interest.*

In the second case the plaintiff recovers upon what were known as the common counts, *e. g.*, as much as his labor was worth, the value of the goods bought, etc. This is the entire benefit of the contract so far as he is concerned. Indeed, properly speaking, the action is for the breach of the promise which the law implies that the defendant shall pay for the goods or services what they are reasonably worth. Sometimes there has been an agreement which has

<sup>1</sup> *Tyler v. Bailey*, 71 Ill. 34; *James v. Hodsdon*, 47 Vermont, 127.

turned out wholly void, *e. g.*, under the Statute of Frauds. In such a case any benefits received under it will, on principles often stated, reduce the damages.

#### RULE.

58. *In an action upon implied contract to recover for services rendered or benefit conferred, the measure of damages is the value of the services or benefit.*

#### ILLUSTRATIONS.

(a) A. is appointed by B. as keeper of property under attachment. In an action on a *quantum meruit* A. recovers the value of his services. The fact that B. received no benefit from the services does not affect the measure of recovery.<sup>1</sup>

(b) An agreement, not in writing, to convey land in consideration of services to be rendered, is partly carried out, and possession is transferred. The measure of damages is the value of the services, less the value of the benefits derived from the possession.<sup>2</sup>

In *Fuller v. Rice*<sup>3</sup> it is said that in cases of contract void under the Statute of Frauds, the *contract rate* (for services) governs. The opinion is by Cooley, J. No reason, however, is given; and clearly if the contract rate governs, the action is not upon an implied contract at all. The contract may no doubt be resorted to to furnish evidence on the subject of the value of the services, and such is the rule generally laid down.<sup>4</sup>

When there has been a part performance of an express contract, and plaintiff is not in default, but has been pre-

<sup>1</sup> *Stowe v. Buttrick*, 125 Mass. 449.

<sup>2</sup> *Ham v. Goodrich*, 37 N. H. 185.

<sup>3</sup> 52 Mich. 435.

<sup>4</sup> *Browne* on the Statute of Frauds, sec. 126; *Emery v. Smith*, 46 N. H. 151; *Cadman v. Markle*, 76 Mich. 448.

vented from continuing by defendant, he has two rights of action: he may sue on the contract for a breach of it, in which case he may recover either his losses, or profits (if capable of proof), as explained above, or he may waive the contract, and recover upon the common counts. In ascertaining the value of what he has done, the contract rate is, as before, evidence. When neither party is in default, the plaintiff can, of course, have no right to waive the contract, and the recovery is limited by the contract rate.

### RULES.

59. *When there has been a partial performance of a contract, and full performance is prevented by the wrongful act of the defendant, the plaintiff's measure of damages is at his election on the contract, or the value of what he has done.*
60. *If full performance is prevented without fault of either party, the measure of damages is the value of what has been done, limited by the contract rate.*

### ILLUSTRATIONS.

(a) The contract is with a company to recover whatever is worth saving from a sunken vessel. The plaintiff is wrongfully prevented from fully performing, and sues specially upon the breach, and also upon the common counts, to recover what his services are reasonably worth. At the close of the testimony, he may elect to recover upon the latter, though in excess of the contract rate.<sup>1</sup>

(b) The contract is for the superintendence of engineering works; the superintendent is to receive one third of the profits. After a considerable portion is done he dies, and the work is completed at a large profit. His compensation is ascertained by

<sup>1</sup> Hemminger v. Western Assurance Co., 95 Mich. 355.

taking one third of such a proportion of the whole profits as the cost of the work done at the time of his death bears to the entire cost.<sup>1</sup>

(c) The prosecution of work under a contract is lawfully stopped by the public authorities. The contractor recovers at the contract rate for the work already performed.<sup>2</sup>

It should be understood that under the second of the two rules given above, neither party being at fault, the plaintiff is really paid for what he has done under the contract. This is the exact benefit of the contract of which he has been deprived.

Where the plaintiff performs only in part, without excuse, he obviously has no rights under the contract, for the breach is his. Nevertheless, on the general equitable principle governing cases in which one confers a benefit upon another, which the latter voluntarily receives and retains, the plaintiff in most jurisdictions is allowed to recover upon a *quantum meruit*. But inasmuch as he is in default, and his breach may have caused damage to the defendant, — *e. g.*, in making full performance more expensive, — the defendant's claim may reduce the plaintiff's.<sup>3</sup>

In actions of tort the measure of recovery is mainly dependent on the nature of the right invaded; so in contract it is mainly dependent on the nature of the agreement violated.

<sup>1</sup> Clark *v.* Gilbert, 26 N. Y. 279.

<sup>2</sup> Heine *v.* Meyer, 61 N. Y. 171. In case of refusal to perform on one side, and inability on the other, there is not only no proof of damage, but even nominal damages seem superfluous, since the defendant might in turn claim them from the plaintiff. Nelson *v.* Plimpton Fireproof Elevating Co., 55 N. Y. 481.

<sup>3</sup> Britton *v.* Turner, 6 N. H. 481; Union Bank *v.* Blanchard, 65 id. 21; Kelly *v.* Town of Bradford, 33 Vt. 35.

## CHAPTER XVII.

### BONDS, LIQUIDATED DAMAGES, AND ALTERNATIVE CONTRACTS.

IN most contracts the parties enter into stipulations with a view to their performance only, and in case of non-performance the law determines the measure of damages. In some, however, they go further, and arrange in advance what the amount of compensation shall be in case of breach. Sometimes this is done by means of an instrument peculiar to our law, called a penal bond, *i. e.*, a sealed obligation to the breach of which a penalty is attached; sometimes by means of an ordinary contract.

At common law one of the forms of action was that of *debt on bond*. The action of debt lay only to recover a sum certain, and until comparatively recent times the law did not permit the taking of interest for money. Hence if A. owed B. money with arrears of interest, while by bringing his action of debt he could recover the principal sum, he was without remedy as to the interest. It was probably in order to obviate this difficulty<sup>1</sup> that the bond was originally introduced in England. It is still in use to-day with us, though the object for which it was introduced has long since been secured by other means.

In a penal bond the obligor binds himself to pay a certain sum of money at a certain time to the obligee. This is called the penalty. By another clause it is stated that the *condition* of the obligation is such that, if a lesser sum of money (frequently half the first amount) is paid, or some

<sup>1</sup> Kames' Prin. of Eq., Bk. III. ch. ii. p. 279 (4th ed. p. 422).

particular act performed, the obligation itself shall be void. At common law, under this peculiar form of contract, if the condition was not strictly complied with at the date fixed, the penalty became the debt, and could be sued for at law in an action of debt. In this way any rate of interest could be provided for, the principal sum being mentioned in the condition, the penal sum being any greater sum that the parties chose to agree upon. It should be noticed that, if the condition<sup>1</sup> was not strictly complied with, the moment the day passed the penalty became the debt, and neither payment nor tender afterwards would avail. The same was true if the condition were for something other than the payment of money.

It was soon found in practice that the introduction of the penal bond produced much injustice, throwing debtors completely into the hands of their creditors, and the chancellors here, as in many other cases, began to grant relief. In equity it was held that the real agreement of the parties was the *condition* of the bond, not the penalty. The practice of "relieving against the penalty" being once established in the Court of Chancery, the common-law courts found their early system superseded, and introduced the practice of staying proceedings upon the bringing into court of the principal debt mentioned in the *condition*, with interest and costs. This practice was confirmed by a statute to the same effect,<sup>2</sup> which has been followed in this country.<sup>3</sup> The defect of these early statutes was that the obligee was still in law entitled to judgment for the whole amount of the penalty. More modern statutes over-

<sup>1</sup> Compare the very serious effect of the breach of a condition in a deed of land. Such a breach works a forfeiture of the estate, which reverts to the heirs of the grantor; while a mere breach of covenant in a deed merely sounds in damages.

<sup>2</sup> 4 Anne, ch. 16, secs. 12 and 13.

<sup>3</sup> 2 R. S. N. Y. 353, secs. 12, 13; Co. Civ. Proc. sec. 1915.

came this last difficulty by compelling the plaintiff in an action upon a bond to *assign breaches*, or, in other words, to state the real cause of action for which he sought redress, and providing that while, on a recovery by the plaintiff, judgment should still be entered for him for the whole penalty of the bond, still that a further judgment should issue that plaintiff have execution to collect the amount of damages actually assessed by the jury.<sup>1</sup> By this process the original severity of the law has become done away, the consequences of suits on bonds made to conform to those in other actions, and damages in them limited to compensation.

A distinction is to be noticed between this species of instrument and one closely resembling it. In the penal bond, strictly so called, the agreement is to pay a fixed sum of money, with a collateral provision for *defeasance*, if some smaller sum be paid, or if some particular act be done. There is no promise or covenant to pay the smaller sum, or perform the particular act. Hence, at common law, as we have seen, no action could be maintained except for the full penal sum, this being fixed as an absolute sum to be received in lieu of performance. It followed that the amount of damages recoverable could never exceed the penalty. But in a great variety of other agreements, besides a provision for a penalty, there are covenants upon which an action may be brought, and if a provision for a penalty is introduced into such an agreement this has never been regarded as a limit of compensation; but for breach of the agreement damages may be recovered beyond the penalty.<sup>2</sup>

<sup>1</sup> 8 & 9 Wm. III. c. xi. sec. 8; Rev. of 1813, 1 R. L. 518, sec. 7; 2 R. S. 353; N. Y. Co. Civ. Proc., sec. 1915; Mass. Pub. Stat. ch. 171, secs. 9-13.

<sup>2</sup> Noyes v. Phillips, 60 N. Y. 408; Addison, Contr., 9th ed. 267; Graham v. Bickham, 4 Dall. 149; Harrison v. Wright, 13 East, 343; Haggart v. Morgan, 5 N. Y. 422; Thompson v. Rose, 8 Cow. 266.

The two rules on this subject may be stated in the following form : —

RULE.

61. *In actions on penal bonds, conditioned for the payment of money or the performance of some collateral act, the recovery is limited to the amount of the penalty.*

ILLUSTRATION.

To secure damages to be paid for its right of way through their property, a railroad company gives a penal bond to nine persons in \$3000. Each obligee can only recover his respective share of this sum, even though the damages assessed amount to more.<sup>1</sup>

RULE.

62. *If a contract contains covenants or agreements, though expressly secured by a penalty, it is not a penal bond, and the plaintiff, suing upon the covenants, recovers his full loss, whether greater or less than the penalty.*

ILLUSTRATION.

A memorandum for a charter-party contains an agreement for a voyage, and concludes "penalty for non-performance £1300." On breach of the agreement the plaintiff is not limited to the penalty.<sup>2</sup>

In actions on bonds the usual limit of recovery is, as already explained, the penalty. Statutory undertakings furnish no exceptions to this rule. These are given to secure a party to a suit against damages and costs resulting from an attachment, injunction, etc., if wrongfully issued or used. The general principle is that in the action on the bond the plaintiff recovers his actual loss.

<sup>1</sup> St. Louis, A. & R. I. R. R. Co. v. Coultas, 33 Ill. 188.

<sup>2</sup> Harrison v. Wright, 13 East, 343.

## RULE.

63. *In an action upon a statutory undertaking the measure of damages is the actual loss within the limit of the penalty.*

## ILLUSTRATIONS.

(a) In a suit commenced by attachment the defendant procures a dissolution of the attachment by giving bond, conditioned to return the property if the plaintiff recovers judgment. The defendant is prevented from returning it by a second attachment, and the plaintiff recovers judgment in the suit. His measure of damages is the amount of the judgment and costs.<sup>1</sup>

(b) In an action to determine the rights of the parties to a wall, claimed by plaintiff to be a party-wall, it appears that defendants are tearing down the wall for the purpose of erecting a new building. A temporary injunction is granted against this, and a delay of many years is occasioned in the completion of the building. In an action on an injunction bond for \$5000, the items of damage properly allowable are: 1. Loss of rent. 2. Increased cost of building. 3. Counsel fees on motion to dissolve injunction. These, with interest, amount to \$9731.12. The recovery is for \$5000.<sup>2</sup>

(c) Plaintiff, before suing out an attachment, gives a bond. The property attached is removed and detained for several months, when the attachment is dissolved. In an action on the bond the measure of recovery is all costs and damages sustained through the wrongful attachment, in the deprivation of the use of the property, its loss, destruction, or deterioration.<sup>3</sup>

(d) An injunction deprives the owner of the use of a portable sawmill. The measure of damages on the bond to dissolve it is the value of the use of the mill, and expenses for service during the time it was kept idle.<sup>4</sup>

<sup>1</sup> Schuyler v. Sylvester, 28 N. J. L. 487.

<sup>2</sup> Roberts v. White, 73 N. Y. 375.

<sup>3</sup> Bruce v. Coleman, 1 Handy, 515.

<sup>4</sup> Wood v. The State, 66 Md. 61.

The same principle of equity which led to the substitution of compensatory damages for the arbitrary penalty of the bond, led to the conclusion that whenever a *definite sum* was named as damages, an inquiry was necessary as to whether this must be regarded as liquidated damages, properly speaking, or a penalty (to be treated merely as security for compensatory damages). The right to liquidate damages has always been jealously watched by the courts; if it were not, precisely such unconscionable agreements as the original money bond might be introduced to work oppression and injustice; and again, if parties might fix their own damages without supervision, the function of courts of justice in establishing the measure of compensation would be seriously hampered. There is in fact a good deal of resemblance between the control of courts over the measure of damages and that exercised by them over contracts themselves. As a general rule parties are allowed to make what contracts they please; but this is subject to the restriction that they must not be unconscionable,<sup>1</sup> or *contra bonos mores*.

Proceeding on this general principle the courts in construing contracts for the liquidation of damages have endeavored as far as possible to harmonize the ordinary rules governing the interpretation of contracts with the necessity of adhering to the general principle of compensation. It must be observed at the outset that the whole question is one, properly speaking, of interpretation, and does not affect the ordinary rules governing the measure of damages in any way. Whenever it appears in a contract of sale, of hiring, etc., that the parties have agreed that in the event of non-performance, one shall pay the other a fixed sum of money, the only question to be determined is whether this is liquidated damages, or whether it is a penalty. In the former case there can be no further inquiry

<sup>1</sup> See *Ogden v. Marshall*, 4 Seld. 340.

into the measure of damages ; in the latter, the ordinary rules governing the particular contract apply. And this question, being one of interpretation, is for the court, not the jury. Nevertheless the rules of interpretation, being binding upon the court, closely resemble rules of law, such as are laid down for the guidance of juries.

The various canons of interpretation which have been laid down by the courts all assume that no one circumstance is decisive upon the subject ; for instance, it is perfectly well settled that the solemn declaration of the parties that the sum provided for is to be taken as a penalty or liquidated damages is not conclusive if the character of the contract shows that it would be improper so to regard it. The principle to be kept in view is the following : —

RULE.

64. *Whenever the contract is such that the amount of damages for breach of it in accordance with the ordinary rules of law is easily established, a stipulated sum greatly differing from what would be the result of the application of the legal rule, will be taken to have been intended by the parties as a penalty, whether termed such by them or not. Otherwise the parties may stipulate their damages.*

It is hardly necessary to say that the intention thus imputed to the parties is not open to question. It is a sort of fiction introduced because of another rule that courts must interpret contracts in accordance with the intention of the parties. As in this case, the very object of the rules is to supersede the intention of the parties, it is said that they *must* have intended what the law holds to be the correct meaning. From this general rule spring numerous subordinate rules, a brief examination of which will be useful in illustrating the subject.

## RULE.

65. *Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security, it is a penalty.*

## ILLUSTRATIONS.

(a) A building contract contains the clause "the said houses to be completely finished" at a certain date, "under a penalty of \$1000." This is a penalty.<sup>1</sup>

(b) The plaintiff makes a written lease of land to the defendant, who agrees to return the lease within ninety days or pay \$3000. This is a penalty.<sup>2</sup>

(c) A. leases premises to B. at a yearly rent of \$6000, and B. deposits with him a sum of \$1500, A. to hold the same as security for the performance of the covenants, the same to be applied as payment of rent on the last three months of the term, provided the lease is not sooner terminated, in which case the \$1500 is to be "forfeited and become the property of the party of the first part absolutely." This is a penalty.<sup>3</sup>

## RULE.

66. *A sum of money to be paid on non-payment of a much smaller sum, or on delivery of something much less in value, is a penalty.*

## ILLUSTRATION.

Defendant as surety binds himself in the sum of \$240 for the performance by his principal of a contract to deliver two boatloads of coal, the sum to be recoverable on failure to deliver either. This is a penalty.<sup>4</sup>

<sup>1</sup> Tayloe v. Sandiford, 7 Wheaton, 13.

<sup>2</sup> Burrage v. Crump, 3 Jones L. 330.

<sup>3</sup> Chande v. Shepard, 122 N. Y. 397.

<sup>4</sup> Curry v. Larer, 7 Pa. St. 470.

It must be always borne in mind that these rules hinge upon the theory of preventing the parties from agreeing upon what the law regards as unfair compensation. But *cessante ratione cessat ipsa lex*, and therefore where the larger sum is a *legal debt*, but the debtor has the option of discharging it by payment before a given date of a less sum, the payment of the larger sum may be enforced after that date.<sup>1</sup>

#### RULE.

67. *If the stipulated sum is plainly disproportionate to the injury, it is a penalty.*

In contracts for work and labor, — *e. g.*, for railroad construction, — when the contractor is paid in instalments as the work progresses, it is frequently provided that a certain percentage of each monthly instalment is to be retained by the other party, to be forfeited if the contract is not performed at the time and in the manner provided. Obviously here the sum *may* be in certain cases greatly disproportionate to the injury, for the amount reserved *increases* as the work progresses; or, in other words, as the risk from non-performance diminishes the loss to the contractor increases. Hence in many jurisdictions it is held that sums so reserved constitute a penalty.<sup>2</sup> In other courts, on account of the *uncertainty* of the extent of the loss, such sums have been held to be liquidated damages.<sup>3</sup> The matter depends, as in all other cases, very much upon the precise terms of the contract.

<sup>1</sup> Thompson v. Hudson, L. R., 4 H. L. 1.

<sup>2</sup> Savannah & C. R. R. Co. v. Callahan, 56 Ga. 331; Jemmison v. Gray, 29 Ia. 537; Potter v. McPherson, 61 Mo. 240; Dullaghan v. Fitch, 42 Wis. 679.

<sup>3</sup> Elizabethtown & P. R. R. Co. v. Geoghegan, 9 Bush, 56; Geiger v. Western Md. R. R. Co., 41 Md. 4; Easton v. Penna. & O. Canal Co., 13 Oh. 79; see further Ranger v. Great Western Ry. Co., 27 E. L. & E. 35, 61.

## ILLUSTRATION.

A contract for railroad construction provides for payments to plaintiff upon estimates of the work as it progresses, with a reserve of fifteen per cent until the whole shall be completed and accepted. The contractor, without showing full performance, may recover the reserve, less the amount of defendant's actual damages from his breach of contract.<sup>1</sup>

## RULE.

68. *A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation according to the ordinary legal standard, and for any of which the stipulated sum is an excessive compensation, is a penalty.*<sup>1</sup>

## ILLUSTRATIONS.

(a) A. agrees with B. to act at his theatre and conform to its rules, B. to pay him £3 6s. 8d. for every performance. The agreement contains a clause that if either party fail to fulfil his contract, or any part thereof, he shall pay the sum of £1000, as "liquidated damages," and not as a "penalty." This is a penalty.<sup>2</sup>

(b) By a clause in a charter-party the parties mutually bind themselves, the ship, freight, and cargo, "in the penal sum of estimated amount of freight" to the performance of all and every of their agreements. This is a penalty.<sup>3</sup>

(c) A contract for the erection of buildings provides that they shall be completed by a given date; that for every week's delay after that date the contractor shall forfeit \$10 per week; that if the contractors are prevented from completing the em-

<sup>1</sup> Dullaghan v. Fitch, 42 Wis. 679.

<sup>2</sup> Kemble v. Farren, 6 Bing. 141.

<sup>3</sup> Watts v. Camors, 115 U. S. 353.



it to be a penalty falls to the ground, and even the use of the word "penalty" is immaterial.<sup>1</sup>

#### RULE.

70. *Where the damages for an entire breach are stipulated, and there is notwithstanding a valid part performance, the rule of liquidated damages has no application.*

#### ILLUSTRATION.

A. binds himself in \$500 "liquidated damages" to convey to B. on demand 3000 feet of land. He executes a deed, and it is afterward found that the land is some five hundred feet short. Here B., having accepted the deed in part-performance, is only entitled to recover the actual damages sustained.<sup>2</sup>

#### RULE.

71. *Where the contract calls for a continuous series of acts, and a failure to perform any one is really a total breach, the stipulated sum, if reasonable, may be recovered on a single breach.*

#### ILLUSTRATION.

A. agrees to refrain from the use of intoxicating liquors during service in B.'s employment. On a single breach the stipulated damages are recoverable.<sup>3</sup>

#### RULE.

72. *Where independently of the stipulation the damages would be uncertain, or incapable, or very difficult of ascertainment, they may be liquidated.*

<sup>1</sup> *Durst v. Swift*, 11 Tex. 273; *Yenner v. Hammond*, 36 Wis. 277.

<sup>2</sup> *Shute v. Taylor*, 5 Met. 61.

<sup>3</sup> *Keeble v. Keeble*, 85 Ala. 552.

## ILLUSTRATIONS.

(a) The plaintiff and other landowners subscribe towards the building of an hotel by defendant near their land; the defendant agrees, in case of non-performance, to pay \$20,000. This is liquidated damages.<sup>1</sup>

(b) An assignor of a mortgage agrees with his assignee that on foreclosure of a prior mortgage covering the same and other premises, the decree shall contain a provision that the other premises shall be sold first, and the proceeds applied to the prior mortgage, and stipulates that if this be done, he will pay the assignee a specific sum, equal to the amount of the mortgage. This is liquidated damages.<sup>2</sup>

(c) A. who is owner of a cheese factory, and engaged in the manufacture of several kinds of cheese by a secret process, agrees with B. and C. to sell them the factory, good-will, trade-marks, etc., to communicate to them only the secret of the manufacture, and after a certain date to refrain from making or vending said cheese and from using the trade-marks or name, "under the penalty of \$5000," which is also termed "stipulated damages." This is liquidated damages.<sup>3</sup>

(d) A. enters B.'s employment, agrees to serve him diligently, remain with him a certain number of years, assist him in his trade, keep his trade secrets, etc., and binds himself "in the sum of \$3000, as liquidated damages, and not by way of penalty or otherwise," for the performance of his agreements. This is an agreement for liquidated damages.<sup>4</sup>

(e) A. agrees to sell an hotel for \$14,000, of which \$3000 is to be paid at a specified time, possession of part to be delivered immediately. The parties agree to "forfeit" \$500 in case of non-compliance by either. This is liquidated damages.<sup>5</sup>

(f) A. promises B. that he will not marry any person except

<sup>1</sup> Chase v. Allen, 13 Gray, 42.

<sup>2</sup> Cowdry v. Carpenter, 1 Abb. Ct. of Ap. Dec. 445.

<sup>3</sup> Tode v. Gross, 127 N. Y. 480.

<sup>4</sup> Bagley v. Peddie, 16 N. Y. 469.

<sup>5</sup> Streep v. Williams, 48 Pa. St. 450.

himself; agreeing at the same time that if he does marry any one else, he will pay B. \$1000. This is liquidated damages.<sup>1</sup>

(g) Under a statute providing for the publication of reports of decided cases, a contract made by State officers with a publisher requires him to furnish each volume at the contract price to any other law-book seller in quantities not exceeding one hundred copies to each applicant; and that for any failure to comply, he shall forfeit the sum of \$100, "not as a penalty, but as liquidated damages." This is liquidated damages.<sup>2</sup>

The application of the foregoing rules to cases of contracts for the sale or exchange of property is involved in some confusion. There seems to be no reason or principle, inasmuch as the damages are in such cases apt to be very uncertain, why the parties should not fix a reasonable sum in liquidation of them in advance. And so, in the case of an agreement for the conveyance of real estate for the sum of \$4000, an agreement that either party in default shall pay the other \$1000, has been held an agreement for liquidated damages.<sup>3</sup>

In New York, however, in cases of sales of real estate, owing to the existence of a peculiar rule of damages, the matter has been decided the other way. The ordinary measure of damages, as we shall see when we come to consider contracts relating to real estate, in case of the failure of a vendee of land to accept a deed, is the difference between the price the vendor was to have received, and the value of the land left on his hands. In New York, however, it has been held that, on tender of a deed by a vendor, and refusal by the vendee, the former recovers the whole price, notwithstanding that the title does not pass. This though on principle it seems wrong, makes the amount of

<sup>1</sup> *Lowe v. Peers*, 4 Barr. 2225.

<sup>2</sup> *Little v. Banks*, 85 N. Y. 258.

<sup>3</sup> *Mead v. Wheeler*, 13 N. H. 351; *Gammon v. Howe*, 14 Me. 250; *Maxwell v. Allen*, 78 Me. 32.

damages perfectly certain from the outset. Hence, where such a contract provided that for failure to carry out an agreement of this nature, either party should forfeit the sum of \$500, this was held to be a penalty, for the court remarked "the damages are capable of being certainly known and estimated."<sup>1</sup>

#### RULE.

73. *Agreements liquidating the damages for carrying on a trade, business, or profession within certain limits, or within a specified period, are valid.*

#### ILLUSTRATIONS.

(a) A. sells B. a newspaper establishment, with subscription list and good-will for \$3500, B. agreeing not to establish any newspaper within certain limits, and in case of breach to pay \$3000, as liquidated damages. The \$3000 are liquidated damages.<sup>2</sup>

(b) A. enters the service of a banking company, and executes a bond in the penal sum of £1000, conditioned for the performance of his duties, and also to pay £1000 as liquidated damages, in case he shall, at any time within two years after leaving its service, accept any employment in any other bank within twenty miles. This is an agreement for liquidated damages.<sup>3</sup>

#### RULE.

74. *Damages for delay in the performance of a contract, if reasonable, may be stipulated.*

#### ILLUSTRATIONS.

(a) A. agrees with B. to perform certain work within a limited time, or to pay a stipulated sum for such time afterwards as it

<sup>1</sup> Richards v. Edick, 17 Barb. 260.

<sup>2</sup> Dakin v. Williams, 17 Wend. 447.

<sup>3</sup> Nat. Prov. Bk. of England v. Marshall, 40 Ch. D. 112. This case decides that there is an alternative remedy by way of injunction in equity.

shall remain unfinished, and executes a bond with condition for the due performance of the work. Such weekly payments are liquidated damages.<sup>1</sup>

(b) In a contract between plaintiffs and E., the latter agree to raise a house to a new grade and pay \$150 per week for any delay. The rental value of the house is \$25 a month. This is a provision for a penalty.<sup>2</sup>

(c) A. agrees to furnish his biography to B. for publication within a time fixed, and for every day's delay to pay \$165. This is a penalty.<sup>3</sup>

(d) A contract to furnish engines for \$8000 within a fixed time contains a provision that the contractor shall forfeit \$100 for every day's delay. This is a penalty.<sup>4</sup>

(e) A. contracts to build a grand stand for a race course to cost \$133,000, agreeing to pay \$100 a day for every day's delay. This is liquidated damages.<sup>5</sup>

It should be noticed that these contracts always contemplate mere delay. When the contractor wholly abandons the work, the party entitled to the benefit of the stipulation cannot lie by and hold him at the given rate for ever. In such a case damages which might in the case of a trifling delay have been reasonable enough become by mere lapse of time preposterous. And when the result is unconscionable, the courts are inclined to treat the question as one of penalty.<sup>6</sup>

<sup>1</sup> *Fletcher v. Dyche*, 2 T. R. 32.

<sup>2</sup> *Clements v. Schuylkill, &c. R. Co.*, 132 Pa. St. 445.

<sup>3</sup> *Greer v. Tweed*, 13 Abb. Pr. (N. S.) 427.

<sup>4</sup> *Colwell v. Foulks*, 36 How. Pr. 306.

<sup>5</sup> *Monmouth Park Ass'n v. Wallis Iron Works*, 55 N. J. L. 132. For other contracts of the same kind, see *Duckworth v. Alison*, 1 M. & W. 412; *Legge v. Harlock*, 12 Q. B. 1015; *Law v. Local Board of Redditch* (1892), 1 Q. B. 127; *Ward v. Hudson R. Building Co.*, 125 N. Y. 230; *Malone v. City of Philadelphia*, 147 Pa. St. 416. In *Law v. Local Board of Redditch*, the ground given is that the damages are payable for the breach of a single agreement, but the reason usually given is uncertainty, as stated above.

<sup>6</sup> *Hahn v. Horstman*, 12 Bush, 249.

It may perhaps be suggested that when the sum would in the case of ordinary delay be fair, it would be more in accordance with principle to hold that the clause has no application to the case of total abandonment by the contractor, and that we are therefore necessarily remitted to the operation of the ordinary rules of law.

#### RULE.

75. *Provisions stipulating the damage for abandonment of contract of service, if reasonable, are valid.*

#### ILLUSTRATIONS.

(a) A contract of hiring contains a condition for two weeks' notice by the employee, and that for failure to give such notice, or to continue work during the two weeks, she shall forfeit a sum, out of any wages due, to be determined by the class of her employment. The class to which she belongs is that of those receiving from fifty cents to one dollar per day. For this class the damages are \$10. This is a valid agreement for stipulated damages.<sup>1</sup>

(b) A similar forfeiture covers all the wages due at the time of leaving. This is a penalty.<sup>2</sup>

#### RULE.

76. *Agreements to liquidate damages for the purpose of evading provisions of law are penalties.*

#### ILLUSTRATION.

A bond provides that if certain bills are not accepted, the obligor will pay the amount of them, with interest at ten per cent by way of penalty. This is a penalty; the usury statute does not allow such interest.<sup>3</sup>

<sup>1</sup> Tennessee Mfg. Co. v. James, 91 Tenn. 154.

<sup>2</sup> Schrimpf v. Tennessee Mfg. Co., 86 Tenn. 219.

<sup>3</sup> Orr v. Churchill, 1 H. Bl. 227.

## RULE.

77. *Where liquidated damages are allowed, interest on the sum from the time of the breach is recoverable.*<sup>1</sup>
- 

**ALTERNATIVE CONTRACTS.** — The contracts just considered are contracts providing that in case of breach the damages shall be liquidated in a certain way. In a certain sense the party in fault has the alternative to perform, or pay, either the stipulated sum, or (in case this is held to be a penalty) the legal rate of damages. But this sort of alternative exists in every contract. A true alternative contract is one which provides for performance in the alternative, where an option is given to do one or the other. Here it is said that in case of breach the plaintiff should recover compensation for the least beneficial alternative, on the ground that had the defendant performed he would have taken upon himself the discharge of the lesser burden.<sup>2</sup> Defendant promises to pay \$500 in Tennessee bank notes, Georgia bank notes, Alabama bank notes, or notes of "good men." The measure of damages is the specie value of the notes in which it would have been most for the interest of the covenantor to have paid.<sup>3</sup>

The principle of alternative contracts has been much discussed, but decisions directly in point are difficult to

<sup>1</sup> This is not the rule in England, *Mayne on Damages*, 5th ed. 159, nor in all American States. It is allowed in New York and New Hampshire, *Mead v. Wheeler*, 13 N. H. 351; *Little v. Banks*, 85 N. Y. 258; *contra*, *Devereux v. Burgwin*, 11 Ired. L. 490; *Hoagland v. Segur*, 38 N. J. L. 230; but on principle it should be allowed whatever interest is allowed on liquidated demands generally.

<sup>2</sup> *Cockburn v. Alexander*, 6 C. B. 791, 814.

<sup>3</sup> *Hixon v. Hixon*, 7 Humph. 33.

find. In the leading case of *Deverill v. Burnell*<sup>1</sup> the contract was that if certain drafts were not paid at maturity the defendant should either return the drafts or pay the plaintiffs the amount of them. Bovill, C. J., thought that this was a strictly alternative contract, that the defendant had an option, and that as the drafts were in fact worthless, only nominal damages could be recovered. But all the other judges agreed that the true meaning of the contract was that of an absolute promise to return the bills, and if defendant does not do so, to pay the amount of them. In a recent Massachusetts case,<sup>2</sup> a physician agreed not to practise his profession in a certain city so long as a purchaser of his business remained in practice there, provided however, that he might resume practice after a certain time on paying to the purchaser \$2000. The court held that this sum was not a penalty nor liquidated damages, but a *price fixed for what the contract permitted him to do if he paid*; and that it would be "against common sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less than two thousand dollars." It will be seen that practically the result of cases like these is the same as in a suit for liquidated damages. The real nature of contracts of this description is lucidly explained by Bronson, J., in *Pearson v. Williams' Adm'rs.*<sup>3</sup>

Another species of alternative contract is an agreement to pay the amount of a claim in specific articles at a certain price. Thus, where a note was given for \$79.50 "on the first day of January, *in salt*, at 14 shillings per barrel," this was held by the New York Court of Errors

<sup>1</sup> L. R., 8 C. P. 475.

<sup>2</sup> *Smith v. Bergengren*, 153 Mass. 236.

<sup>3</sup> 24 Wend. 244: *affd.* 26 Id. 630.

to show an intention to give the party his election to pay the same expressed in money, or in salt, and that defendant having neglected to avail himself of the option, the instrument became an acknowledgment of a debt for the sum named ;<sup>1</sup> the rule of the least beneficial alternative is not applied.

A very common case of a true alternative contract is that of the frequent provision in fire insurance policies, that in case of loss the insurer, instead of paying it in money, may rebuild or repair on giving notice of his election to do so. Here, however, the question of the least beneficial alternative does not arise, for upon election and notice the first alternative disappears, and if the insurer does not go on, the rule of damages becomes the amount necessary to repair or rebuild.<sup>2</sup>

In *Deverill v. Burnell*<sup>3</sup> Bovill, C. J., puts the case of a contract to deliver a horse after a race, or pay £1000. In that case it is obvious that if the horse lost the race, it might be most advantageous to deliver him ; otherwise, if he won ; and in accordance with the rule of the least beneficial alternative the plaintiff would only recover the amount representing the better alternative for the defendant. But in the light of all the authorities we have been considering, would this be the conclusion ? More probably the solution would be either, (1) the sum named is a penalty ; or (2) it is liquidated damages, or (3) it is a contract like that in *Deverill v. Burnell*, and on non-delivery of the horse becomes a mere money contract. Upon the whole, it must be said that the rule of the least beneficial alternative has hitherto been hardly applied in practice. It may be suggested that where a person binds himself either

<sup>1</sup> *Gleason v. Pinney*, 5 Cow. 152 ; revd. 5 Wend. 393.

<sup>2</sup> *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429 ; *Am. Cent. I. Co. v. McLanathan*, 11 Kan. 533.

<sup>3</sup> L. R., 8 C. P. 475, 481.

to do some act or pay money, as a general rule, upon his neglect to do the act, the obligation to pay becomes according to the common understanding of mankind absolute, and the fact that it might have been less burdensome for him to do the act, seems no reason why he should first neglect to do it, and then claim that the alternative obligation to pay the sum of money is of no effect. Such a construction really cuts the other alternative out of the contract altogether, and, instead of giving him an alternative of performance, gives him an alternative of breach.

## CHAPTER XVIII.

### PARTICULAR CLASSES OF CONTRACTS.

**SERVICE.** — When one is wrongfully discharged by a master or other employer, the first question which arises is what is his right of action. He may sue at once; but in that case, if the contract covers a long period of time, does he recover his damages once for all, or only down to the time of trial? On the other hand, may he waive his contract and sue upon a *quantum meruit*? Or, may he wait till the end of the term, and then recover the full amount? These questions relate both to the right of action, and the measure of damages, and, as they are differently answered in different jurisdictions, it is only possible to give a rule which seems in accordance with the general principles governing in actions of contract, and has the weight of authority on its side. The matter has already been touched upon.<sup>1</sup>

#### RULE.

78. *For wrongful discharge from employment under an entire contract the measure of damages is the contract rate of compensation for the remainder of the term, less what has been or might with reasonable diligence have been earned elsewhere; <sup>2</sup> if the contract is not entire the recovery is limited to the period which the breach affects.*

<sup>1</sup> Chapter IX.

<sup>2</sup> Under the rule of avoidable consequences.

## ILLUSTRATIONS.

(a) An actor contracts with a manager to play certain business for thirty-six weeks, at \$35 per week. At the close of the nineteenth week he is discharged without cause. After his discharge he earns \$60 within the term and abandons an engagement worth \$57. He is entitled to recover the full amount for the remainder of the term, less \$117.<sup>1</sup>

(b) The contract is to pay \$1500 quarterly, for a year, from March 21, 1889, and expenses when necessary. The breach occurs November 1st. It is held that this is not an entire contract, that the plaintiff has a right of action at the end of each quarter, and may recover for two full quarters and expenses.<sup>2</sup>

The general rule in the case of entire contracts must however be limited by the rule as to certainty. When the contract is to pay an entire sum for a long term, and the trial takes place before it is ended, it may often be impossible to say what the plaintiff would have earned during the remainder of the term. In such case the plaintiff, unless he waits till the end of the term, only recovers to the time of trial. The contract, for instance, is to superintend a business for five years, at \$2000 a year; the breach occurs at the end of the first year. The plaintiff is allowed only to recover to the time of trial.<sup>3</sup>

---

NEGOTIABLE INSTRUMENTS. — It has been already stated that the general rule of the Common Law is that for breach of a promise to pay money the damages are restricted to interest. In other words, though the plaintiff offers to

<sup>1</sup> *Sutherland v. Wyer*, 67 Me. 64; acc. *Everson v. Powers*, 89 N.Y. 527.

<sup>2</sup> *La Coursier v. Russell*, 82 Wis. 265.

<sup>3</sup> *Gordon v. Brewster*, 7 Wis. 355.

show that the failure to pay has caused him the loss of more valuable employment for the money, or even has reduced him to insolvency, the law excludes consequential damages altogether. This is an apparent exception to the rule of *Hadley v. Baxendale*; the reasons for it have been already given. It is in reality an exception which helps to prove the rule itself. Consequential damages, it will be remembered, can only be proved when it can be shown that they were within the contemplation of the parties. Now in the case of a failure to pay money it is almost impossible for the debtor to know in advance what the effect of non-payment will be, because he has no means of knowing what other resources in the way of property or credit the creditor has. In the case of an ordinary contract for the delivery of personal property, for instance, with notice in advance of a sub-sale, it is clear that the vendor from the outset knows exactly what the vendee runs the risk of losing, and all the vendee need show is that he could not replace himself; but in the case of money, the creditor should, in order to bring himself within the rule of *Hadley v. Baxendale* and that of avoidable consequences, be able to show, 1st, the consequential damage, 2d, that he could not get the money anywhere else, and, 3d, that the debtor had this risk in contemplation. Money is always procurable by those whose circumstances are such that others will give them credit. Hence, in this case, proof that the damages were in the contemplation of the parties involves proof that the debtor knew the circumstances and resources of the creditor. But this would hardly ever be capable of proof, and the law declares that, for breach of a promise to pay money, the measure of damages is the value of its use,—that is, the interest; and that this is a sound and reasonable rule may be inferred from the fact that it prevails generally among all commercial and civilized nations.

To apply this rule to negotiable paper, it must be noted that on a bill of exchange the promisor is the *acceptor*; on a note, the *maker*. In the case of a bill or draft the promisee may be the drawee, or some subsequent indorsee. In the case of a note the promisee is the payee, or any subsequent indorsee. Bank checks are merely species of bills of exchange. The bill or note may be indorsed through several hands, and, as a general rule, the obligation to a holder is to pay the face of the paper. There may, however, have been circumstances connected with the negotiations which show that, as between the holder and promisor, it would be inequitable to enforce this rule, and in such case the promisor may be allowed to defend as to the whole or a part of the consideration; but these circumstances vary in each case, and belong rather to the subject of the right of recovery than to that of damages. In the absence of such circumstances, the note or bill, passing from hand to hand in the open market, comes into the possession of the *bonâ fide* holder for value, as a promise to pay money to the full benefit of which he is entitled.

#### RULE.

79. *In an action by a bonâ fide holder for value against the maker or acceptor of negotiable paper, the measure of damages is the face of the paper with legal interest from the time of breach.*<sup>1</sup>

#### ILLUSTRATION.

A promissory note, before delivery, is deposited by the maker to be delivered to the payee in a certain contingency. It is delivered without the knowledge of the maker, and without

<sup>1</sup> The "face" includes interest up to the time of breach if so expressed in terms.

the happening of the contingency. The payee puts it in circulation by transferring it before maturity to A. who has no notice of the circumstance. A. recovers the face value of the note.<sup>1</sup>

This is the only rule of universal application on the subject. As to what constitutes a *bonâ fide* holder, and whether and under what circumstances the amount he pays for the paper affects the measure of his recovery, the rules in each jurisdiction vary very much. Thus in some jurisdictions the limitation upon the rule exists that if the note was originally void, or without consideration, only the amount paid can be recovered.<sup>2</sup>

---

SALES. — No class of cases throws a clearer light on the principles of the law of damages for breach of contract than those relating to sales, and executory contracts for the delivery of personal property. The difference between the two is that in the first there is an immediate transfer of the absolute property in the thing sold for a money price;<sup>3</sup> in the second, the contract so far as this particular is concerned is executory. This distinction so far as damages are involved is material.

Properly speaking, a sale, or “bargain and sale,” takes place whenever the parties intend that the title shall pass immediately. Whether the price is immediately paid, or possession immediately delivered, is utterly immaterial; and this is called an *executed* sale. All other contracts for future delivery are executory; *i. e.*, they amount to a promise on the one side that the title shall pass, and on the other that a price shall be paid. It is obvious that the position of the buyer and seller in the two cases in case of a breach is entirely different. In the first the

<sup>1</sup> *Fearing v. Clark*, 16 Gray, 74.

<sup>2</sup> *Holcomb v. Wyckoff*, 35 N. J. L. 35.

<sup>3</sup> Benjamin on Sales, § 1.

buyer is already vested with the title to the property ; in the second he is not. In the first, the seller can do nothing further to fix his rights as to title ; in the second, he still owns the property, and has a right of action for breach of the contract to accept it. Both classes of cases are often spoken of indifferently in the decisions as sales. Here, as elsewhere, it must be always understood that the rule as to certainty, the rule as to avoidable consequences, and the rule of *Hadley v. Baxendale* are always at hand to restrict or enlarge the application of the general rules. The first case that arises is that of a breach of the contract by the seller.

It has been already seen that the general rule in all cases of contract is that the plaintiff recovers the net benefit of his contract ; and the question, in the case of a sale, is, what is this benefit which he has lost ? It is evidently the difference between the money price paid by him and the value of the thing sold to him, but which he has failed to receive. He may buy it to keep, or he may buy it to sell again ; he may buy it in order to fulfil a sub-contract, or he may buy it for purposes of consumption. In any case, what he has lost is the difference between what he has paid and the actual value of the article. This is usually the market value, or what he would have to pay for a similar article in the market. But not necessarily so. The thing sold may have no market value, or may have a special value owing to a sub-contract, of which the defendant had notice. It is in reality always the *value* of the bargain which the plaintiff recovers.<sup>1</sup>

Three cases may arise, (1) when there is no difference in value, *e. g.*, when the market price has not risen ; (2) when the value has risen ; (3) when the value has fallen. In the first case the plaintiff has lost nothing, and consequently can only recover nominal damages.<sup>2</sup> The sec-

<sup>1</sup> See Chapter X.

<sup>2</sup> *Faulkner v. Closter*, 79 Ia. 15.

ond case is the usual one; the following rule applies to it: —

#### RULE.

80. *For breach of the contract of sale the purchaser's measure of damages is the difference between the contract price and the value of the thing sold at the time and place of delivery, with interest.*

#### ILLUSTRATIONS.

(a) D. buys of F. 150 casks of madder, deliverable on or before April 1, 1850, and payable in F. & H.'s acceptance at six months. On the first of April D. demands the madder, and tenders payment in accordance with the terms of the contract; i. e., in the six months' paper called for. D. is entitled to recover the difference between the contract and market price on April 1, with interest from October 1, the time when the paper would have become due.<sup>1</sup>

(b) M. contracts with B. to deliver 500 tons of iron, in equal proportions, in September, October, and November. In August M. repudiates the contract. The measure of damages is the sum of the differences between the contract and market prices of one-third of 500 tons on the last day of September, October, and November.<sup>2</sup>

(c) The contract is to deliver wood to plaintiffs as needed during the brick-making season, and there is a breach early in the season. This is a continuing contract, and the measure of damages is the difference in value from time to time during the season, and not at the time of the first refusal.<sup>3</sup>

<sup>1</sup> *Dana v. Fiedler*, 12 N. Y. 40. This case, decided in 1854, is perhaps as complete an illustration of the common rule as is to be found in the books. The time of breach is April 1, and this is the date for taking the market price, but the term from which interest runs (inasmuch as the paper runs for six months) is October 1. It appears to be also one of the first cases which settled the rule that the plaintiff was entitled to interest as a matter of right.

<sup>2</sup> *Brown v. Muller*, L. R., 7 Ex. 319.

<sup>3</sup> *Long v. Conklin*, 75 Ill. 32.

(d) Delivery is to be "on or before" a certain day. If not delivered on the day, the value at that date fixes the amount of damages.<sup>1</sup>

(e) On March 16, S. sells G. 50 quarters of oats. No time for delivery is mentioned. G. does not remove the oats and S. sells them at an advance to a third person. G.'s measure of damages is the difference in price on the resale.<sup>2</sup>

(f) On the 18th of July K. contracts to sell to T. 100 shares in a projected railway. At the time of the contract no shares are in existence, but K. has an allotment entitling him to the shares. On the 12th of August, K. refuses to perform. No scrip is issued till October. A verdict is found for £150, the difference in value on the date of issuing the scrip. This is wrong. The day of breach, the 12th of August, fixes the damages. K. should have delivered the allotment within a reasonable time from the 18th of July.<sup>3</sup>

(g) The contract is to deliver 100,000 shingles at B., at \$1.25 per thousand. On the day fixed for delivery the price at B. has risen. On the trial, the jury is allowed to receive evidence of the price at other places, and directed to take an average, after adding or deducting transportation. Such a direction is wrong. The market price at B. fixes the measure of damages.<sup>4</sup>

(h) A company having coal mines at Grand Tower, on the Mississippi, agrees to deliver 150,000 tons of coals to P., at \$3.00 a ton, during a year in equal daily proportions, 15,000 per month. Coal rises greatly in price, and the company fails to deliver 30,000 tons. There is no market at Grand Tower. On the trial, P. is allowed to show the prices of coal at all points on the Mississippi, from Cairo to New Orleans, and the court charges the jury that the measure of damages is the cash value of the coal of the kind contracted for, at Cairo or points below it, deducting the contract price, and the cost and expense of transporting it to such points, making allowance for the risk and

<sup>1</sup> Smith v. Berry, 18 Me. 122.

<sup>2</sup> Greaves v. Ashlin, 3 Camp. 426; acc. Williams v. Woods, 16 Md. 220.

<sup>3</sup> Tempest v. Kilner, 3 C. B. 249.

<sup>4</sup> Gregory v. McDowel, 8 Wend. 435.

hazard of such transaction. On appeal this charge is held wrong. The true rule is the price at the nearest available market.<sup>1</sup>

(i) A. contracts to deliver to B. a quantity of oats at a certain price, which B. pays in advance. A. fails to deliver. The measure of damages is fixed by the market price at the time fixed for delivery, and is not affected by the fact of the payment of the price in advance.<sup>2</sup>

In many jurisdictions it is maintained that when payment is made in advance, a different rule of damages should apply, but there is no agreement as to what the rule should be. The difficulty has been already considered in cases of conversion, which in this respect is nothing more than a forced sale; and it arises also when the defendant fails to replace stock. It is said that there ought to be a different rule in such cases, either because the property was of a fluctuating value (stocks), and consequently the plaintiff *might* have made a profit of which the defendant's act has deprived him, or because the defendant is kept out of his money which he *might* have employed to advantage. With regard to this subject, as it is impossible to state any general rule other than the one above given, it is only necessary to say that on principle there is no difference between cases of sales when the price is paid in advance, and when it is not. In either case, what the plaintiff loses is the value of his bargain, and if he gets this, he is as well off as if the contract had been performed. Of course if he can show, under the rule in *Hadley v. Baxendale*, that both parties contemplated some special use, then he may recover consequential damages; but this is a very different thing from speculating upon what he *might* have done with the property or the money. It should be noticed also that the

<sup>1</sup> *Grand Tower Co. v. Phillips*, 23 Wall. 471.

<sup>2</sup> *Hill v. Smith*, 32 Vt. 433.

property may fall, instead of rising in value. In this case the plaintiff loses even if the contract is performed.<sup>1</sup>

The allowance of consequential damages and the application of the rule relating to the contemplation of the parties have already been explained. These rules of course come into play only when both parties are affected by knowledge of the special purpose in view. It sometimes happens that the purchaser has some special object in view involving a larger profit, while the seller knows nothing of this, but supposes the use to which the article is to be put is a common and usual one; and the following rule has been declared to be the law: If the special purpose from which the larger profit may be obtained is unknown to the seller, the measure of damages is the profit which would result from the ordinary, and not the extraordinary use. Defendant agrees to sell the plaintiffs the hulk of a floating boom derrick. The plaintiffs want it in order to place in it cranes for the purpose of trans-shipping coals. This purpose is novel, and unknown to defendants. Defendants suppose that plaintiffs mean to use the hulk as a coal store, and this is the most obvious use for it. There is a delay in delivery, which in the one case would have occasioned a loss of £420. The loss from not being able to put it to the special use intended was much greater. The measure of damages is £420.<sup>2</sup>

On the other hand the purchaser may refuse to perform. In this case, if the title to the property has passed, *i. e.*,

<sup>1</sup> Cf. *Startup v. Cortazzi*, 2 C. M. & R. 165; *Clark v. Pinney*, 7 Cow. 681; *Arnold v. Suffolk Bank*, 27 Barb. 424; for other cases see Benjamin on Sales (Bennett's 6th Am. ed.) 901.

<sup>2</sup> *Cory v. Thames Iron Wks. Co., L. R.*, 3 Q. B. 181; a case which makes it very clear that this must be the rule; the larger loss cannot be given because the special use was not contemplated by both parties: if the other measure of damages cannot be resorted to, the plaintiff is without remedy.

if the sale is executed, the seller usually recovers the contract price. If there is no contract price he recovers the value of the article. Or he may sell for the account of the purchaser, and charge him with the price obtained.<sup>1</sup>

#### RULE.

81. *When the title has passed, the seller's measure of damages is the contract price ; if there is no contract price it is the value of the subject of sale. He may sell the property for the purchaser, and recover the difference between the contract price and the net proceeds of such resale.*

#### ILLUSTRATIONS.

(a) The owner of a chattel requests A. to find a purchaser for it, but does not fix any price. A purchaser is found, and sale effected to B., but without any price being fixed. In an action by the owner against B. the measure of damages is the fair value of the chattel.<sup>2</sup>

(b) A. orders an article to be manufactured by B. On notice of its completion A. neglects to pay for and take it. B.'s measure of damages is the contract price.<sup>3</sup>

(c) A. sells B. 100,000 pounds of hops, at seventeen cents per pound. B. sells to C. at an advance of ten and one half cents. Within a reasonable time after refusal to accept, B. puts them in the hands of a hop-broker who sells them at twenty cents. B. is entitled to recover the difference.<sup>4</sup>

<sup>1</sup> There is a good deal of confusion in the decisions on this subject, but clearly the only case in which the seller can sell *for* the vendee, is where the title has passed, and the property belongs to the buyer. It is said in *Dustan v. McAndrew*, 44 N. Y. 72, that he "may keep the property as his own" and recover the difference between the market price and contract price. But that can only be in case the title has *not* passed.

<sup>2</sup> *Taft v. Travis*, 136 Mass. 95.

<sup>3</sup> *Ballentine v. Robinson*, 46 Pa. St. 177.

<sup>4</sup> *Dustan v. McAndrew*, 44 N. Y. 72.

(d) V. sells to S. a one-third interest in a partnership, the price to be \$10,000, and the title passing at once. S. refuses to pay, and V. after notice sells it for \$7500. In an action against S. his measure of damages is \$2500.<sup>1</sup>

(e) A. sells hides to B. deliverable at Owego. On refusal by B. to pay for them, A. after notice to him, sells the hides at Chicago, the best market for the purpose. A. can now hold B. for the difference between the contract and selling price, together with expenses.<sup>2</sup>

#### RULE.

82. *When the title has not passed the measure of damages is the difference between the contract price and the value of the subject of sale at the time and place of delivery.*<sup>3</sup>

#### ILLUSTRATIONS.

(a) The contract is to deliver iron in June. At the request of the vendee the time for delivery is postponed from time to time. The damages must be estimated according to the market price of iron at a reasonable time after the last request to withhold delivery.<sup>4</sup>

(b) The contract, made in New York, is to deliver 10,000 boxes of glass at Antwerp on ship-board. The court charges the jury that the vendor is entitled to recover the difference between the contract price and the market price in New York. The vendee excepts on the ground that the market price at Antwerp must govern. The exception is sustained, and a new trial granted.<sup>5</sup>

<sup>1</sup> Van Brocklen v. Smeallie, 64 Hun, 467.

<sup>2</sup> Sawyer v. Dean, 114 N. Y. 469.

<sup>3</sup> When the title has not passed, the seller may obviously resell, for the property is his own; but in such a case the price obtained is nothing more than evidence of the value, which may be proved in other ways. The source of the confusion noted above is that in executory sales the plaintiff has often an option to treat the refusal of the defendant as final, in which case the title remains in him, or to make tender, when upon refusal, the title passes to the purchaser.

<sup>4</sup> Hickman v. Haynes, L. R., 10 C. P. 598.

<sup>5</sup> Cahen v. Platt, 69 N. Y. 348.

(c) The contract is to deliver paving stones at Dover Street Bridge, Boston. The ruling is made and excepted to that if there is no market value at Dover Street Bridge, the measure of damages is the difference between the cost of delivering them there and the contract price. The exception is sustained and a new trial ordered. If there is no market at the precise spot fixed upon for delivery, the cost of getting the stones to the nearest market must be subtracted from the price there, in order to find the value at the place of delivery.<sup>1</sup>

(d) A. employs B. to make surgical instruments for him, and refuses to accept. The instruments are worthless in B.'s hands, A. holding an exclusive patent right to make and sell. The measure of damages is the contract price.<sup>2</sup>

(e) The contract price and the market price are the same. Only nominal damages can be recovered.<sup>3</sup>

The question of the time of breach becomes of importance when either party undertakes to rescind the contract by refusing to perform. It is settled in the case of an executory contract that when one party definitely refuses to perform the other may sue before the time fixed for performance.<sup>4</sup> And this is so in the case of sales; but the rule does not mean that the party, by thus refusing, can against the will of the other fix a time at which the damages are to be calculated. On the contrary, the purchaser, if the seller refuses to perform, or the seller, if the purchaser refuses, provided he hold himself in readiness on his own side to comply with the terms of the agreement, can always hold the other party to the precise time stipulated.<sup>5</sup>

<sup>1</sup> *Barry v. Cavanagh*, 127 Mass. 394.

<sup>2</sup> *Allen v. Jarvis*, 20 Conn. 38.

<sup>3</sup> *Foos v. Sabin*, 84 Ill. 564.

<sup>4</sup> *Hochster v. De la Tour*, 2 E. & B. 678.

<sup>5</sup> *Windmuller v. Pope*, 107 N. Y. 674; *Kadish v. Young*, 108 Ill. 170; *Roper v. Johnson*, L. R., 8 C. P. 167; *Frost v. Knight*, L. R., 7 Ex. 111; *Leigh v. Paterson*, 8 Taunt. 540. When the contract is

**WARRANTY.** — In the case of sale with warranty of quality or otherwise, if the title is vested in the vendee, what he loses if the warranty is not made good is the difference in value; and this is the ordinary rule; but consequential damages are extremely common.

**RULE.**

83. *For breach of a warranty the purchaser's measure of damages is the difference between the actual value of the subject of sale and the value which it would have had at the time of the sale, if it had corresponded with the warranty.*

**ILLUSTRATIONS.**

(a) M. sells to R. cows, warranting that they are with calf. His measure of damages is the difference between their value in that condition and in their actual condition.<sup>1</sup>

(b) L. sells to B. a quantity of Connecticut tobacco, warranted to be "like samples," and the price is paid. On delivery, it appears that the tobacco is Massachusetts tobacco, and inferior to the samples. B. having sold the tobacco, his measure of damages, in the absence of any other evidence as to value, is the difference between the value of the tobacco as warranted (the contract price) and the price obtained at the second sale.<sup>2</sup>

(c) Stock is sold with a guaranty that it shall be worth \$700 within a year. During the year the highest price is \$500; at the end of the year the purchaser sells it at \$330, — its market value. The measure of damages is \$200.<sup>3</sup>

(d) Coal dust is sold to be used in the manufacture of brick, warranted to be free from soft coal dust. Both parties know that if mixed with soft coal dust it will injure the brick. The

severable, however, as in ordinary cases of work and labor, a countermand will relieve the party of further liability. *Clark v. Marsiglia*, 1 Den. 317.

<sup>1</sup> *Richardson v. Mason*, 53 Barb. 601.

<sup>2</sup> *Bach v. Levy*, 101 N. Y. 511.

<sup>3</sup> *Woodward v. Powers*, 105 Mass. 108.

coal dust is partly from soft coal. The purchaser's measure of damages is the injury to the brick.<sup>1</sup>

(e) Cabbage-seed is sold, warranted to produce Bristol cabbage. The seed being of an inferior quality, the crop is of little value. The purchaser's measure of damages is the value of an ordinary crop of Bristol cabbages, deducting all expense of raising the crop, as well as the value of the crop actually raised.<sup>2</sup>

(f) A cow is sold to a farmer, with a warranty that she is free from foot and mouth disease. The cow having the disease is placed with others; some of these become infected, and they, as well as the cow sold, die. The jury are told that if they find that the seller knew that the buyer was a farmer, and that he would therefore naturally place her with other cows, he would be liable for the entire loss. On appeal, this is held correct.<sup>3</sup>

(g) Sheep are sold warranted sound. They are not in fact sound, and they communicate disease to other sheep. The seller must be taken to know that sheep are rarely, if ever, kept separate, and is liable for the whole loss.<sup>4</sup>

(h) A link in a chain cable, sold with warranty, breaks. The value of the anchor lost with the cable may be recovered.<sup>5</sup>

An action upon a warranty may be an ordinary action of contract, or it may be an action of tort. The former case arises whenever the suit is upon an express undertaking as to quality, and it is evident that in the cases just considered the underlying idea is that the plaintiff shall recover the benefit of a broken contract. But an action on a warranty may and quite as often does sound in tort, as in the case of false representations as to quality, etc., made by the seller, with a view to induce the purchaser to buy.<sup>6</sup> Here the tort consists in the falsehood followed by damage. Action may be also brought for deceit, fraud, or

<sup>1</sup> *Milburn v. Belloni*, 39 N. Y. 53.

<sup>2</sup> *Passinger v. Thorburn*, 34 N. Y. 634.

<sup>3</sup> *Smith v. Green*, 1 C. P. D. 92.

<sup>4</sup> *Packard v. Slack*, 32 Vt. 9.

<sup>5</sup> *Borradaile v. Brunton*, 8 Taunt. 535.

<sup>6</sup> *Shippen v. Bowen*, 122 U. S. 575.

false representations in a sale, without the conception of a warranty being introduced.

It has always been thought that whether the action is based on a warranty or on fraud or deceit, the measure of damages should be the same,<sup>1</sup> for what the vendee loses is not merely the money which he pays out, but the difference between what the article bought would have been worth had it corresponded with the representation and its actual value. What he sues for is damages for a tort which has induced a contract. There is a large class of cases, however, in which this rule is not applicable, because it is impossible to ascertain what the value of the article would have been. In such cases there must be an alternative rule, which would of course, as in all other cases, be the actual loss.

#### RULE.

84. *When this difference cannot be ascertained, the plaintiff recovers his actual loss. The rule is the same in actions for deceit, fraud, or false representations in sales.*

#### ILLUSTRATIONS.

(a) B. sues S. for false representations in the sale of mining stock, alleging that he paid therefor \$1.50 per share, that the stock is worthless, and that, had the representations been true, it would have been worth \$10 per share; the measure of damages is not what B. might have gained, but the money paid out, less any value the property acquired may have.<sup>2</sup>

(b) P. sues the directors of a company for deceit in the sale of shares, consisting in a false statement that the company has the right to use steam-power. The measure of damages is the price paid by him less the real value of the shares.<sup>3</sup>

<sup>1</sup> *Whitney v. Allaire*, 1 Comst. 305, 312.

<sup>2</sup> *Smith v. Bolles*, 132 U. S. 125.

<sup>3</sup> *Peek v. Derry*, 37 Ch. D. 541.

(c) The action is to recover damages for the sale of a stallion by means of false representations that he is fit for breeding purposes. The measure of recovery includes the expense of keeping the animal a reasonable time to test him.<sup>1</sup>

It must be admitted that the distinction here taken is not to be found in the cases. Nevertheless it is offered as the best means of reconciling the decisions, and as in strict accordance with the rule of certainty. The distinction made in the cases is between tort and contract. But an action for damages for a tort which has induced a purchase would seem to partake of the nature of both, and the ordinary action on a warranty is probably in most cases an action of tort. In the case last cited the Supreme Court of Massachusetts say that the plaintiff may recover any damages within the contemplation of the parties. As the action was in tort, the remark would have no force were not the contractual relation of the parties out of which the tort and the action grew, in the mind of the court.<sup>2</sup> In the case of breach of warranty of title, when there is no title at all, the purchaser, losing the property itself, may treat the contract as void for want of consideration, and sue to recover back the consideration money, even when this was in excess of the value of the article sold.<sup>3</sup> If he does not do this, the ordinary rule of damages is modified by the circumstance that he gets nothing by his bargain, and also, has been involved in a contest over the title. In such cases the measure of damages is often said to be the value of the chattel at the time of the purchase with interest, together with the necessary costs of defending the title, with interest.<sup>4</sup> But inasmuch as the failure of title may

<sup>1</sup> Peak v. Frost, 162 Mass. 298.

<sup>2</sup> For a full discussion of the nature of the *liability* involved in actions of this class, see Angus v. Clifford (1891), 2 Ch. D. 449.

<sup>3</sup> Wilkinson v. Ferree, 24 Pa. St. 190.

<sup>4</sup> Rowland's Admrs. v. Shelton, 25 Ala. 217.

be only partial, or the breach consist in the existence of outstanding liens, the rule has been stated as follows : —

RULE.

85. *For breach of warranty of title the measure of damages is the difference in value between such title as the purchaser obtains, and such title as the seller undertook to convey.*

ILLUSTRATION.

H. sells G. as a chattel a shop on B. Street, together with an unexpired term of the lease of the land on which the shop stands. The shop was in fact part of the realty, but G. holding under the lease has not been disturbed in possession. The trial judge charges the jury in accordance with the rule just stated, and this is excepted to. The exceptions are overruled, the court saying that the rule is “sufficiently favorable to the defendants.”<sup>1</sup>

But, as HOAR, J., says, in the case just cited upon the question of title, the general rule — the difference between what *purported* to be sold, and what was actually sold — is still the true one. In the ordinary case the defect is in quality or quantity, or fitness for a purpose. Here it is in the extent of the interest which passes.

---

CONTRACTS OF INDEMNITY. — Contracts of indemnity assume a variety of different forms. There are, for instance, implied contracts of suretyship, as between parties to negotiable paper, and contracts of express guaranty. Another class of cases is that of sureties in official bonds, which have been already referred to. The fundamental distinction to be noticed is that between an affirmative

<sup>1</sup> *Grose v. Hennessey*, 13 All. 389.

covenant to do a specific thing, as to pay a sum of money, or discharge one from a debt or liability, and one of indemnity against damage by reason of the non-performance of the thing specified.<sup>1</sup> In the former case the contract is broken, and damages are to be recovered on the defendant's failure to do the specific thing, or to discharge the debt or liability; in the latter, there is no breach until actual damage is sustained.

### RULE.

86. *For breach of a contract to pay or discharge a debt, or to save harmless from a liability, the measure of damages is the amount of the debt or liability, though the plaintiff has not paid it.*

### ILLUSTRATIONS.

(a) H. agrees with F. to "assume and pay" all the debts of a firm of which F. is a member, and also to "indemnify and save harmless," F. and the firm from any claims arising by reason of the debts. These are independent stipulations, and F. can maintain an action against H. before he has paid anything.<sup>2</sup>

(b) W. agrees with H. that if he, H., will sue C. for rent in arrears, and obtain judgment and levy on the property, he will bid it off for whatever the judgment and costs amount to. H. sues and obtains judgment, and gives notice of a sale. W. does not bid. In a suit by H. against W., the measure of damages is the amount of the judgment with interest.<sup>3</sup>

(c) M. assigns a contract to D. & P. who "assume" it, and agree to save M. harmless from "all liability." There is a liability on a sub-contract for \$11,048.08, which D. & P. neglect

<sup>1</sup> Gilbert v. Wiman, 1 N. Y. 550.

<sup>2</sup> Farnsworth v. Boardman, 131 Mass. 115.

<sup>3</sup> Wicker v. Hoppock, 6 Wall. 94.

to pay. The agreement is broken by this failure, and M. can recover the amount of the liability with interest.<sup>1</sup>

(d) The grantee of land upon which there is an existing power of sale mortgage, secured also by a promissory note, takes it by a deed containing a covenant that it is free from incumbrances except a mortgage to A. for \$4000, "which the grantee assumes, and agrees to hold the grantors harmless from." On default the premises are sold under the power of sale, but the amount realised is not sufficient to pay the debt in full. In a suit upon the covenant, the measure of damages is the amount remaining due upon the note.<sup>2</sup>

This rule seems now to be firmly fixed, on the ground that, though ordinarily parties injured by a breach of contract cannot recover unless they can show actual loss, still they have the right to make what contracts they please, and if they choose to provide that mere liability shall be made good, no principle of law is infringed. One objection to the rule has been said to be that the money the defendant may pay may not be applied by the plaintiff to the discharge of the original debt.<sup>3</sup> But this after all is no concern of the defendant's. His obligation is satisfied, while, so far as regards the original creditor, he has no claim against the indemnitor whatever.

#### RULE.

87. *For breach of a contract to indemnify whether expressed or implied, no damages can be recovered without proof of actual pecuniary loss. The measure of damages is the amount of the loss.*

<sup>1</sup> Mills v. Dow, 133 U. S. 423 ; for other cases see Hodgson v. Wood, 2 H. & C. 649 ; Trinity Church v. Higgins, 48 N. Y. 532 ; Conner v. Reeves, 103 N. Y. 527 ; Maloney v. Nelson, 144 N. Y. 182.

<sup>2</sup> Locke v. Homer, 131 Mass. 93.

<sup>3</sup> Loosemore v. Radford, 9 M. & W. 657.

## ILLUSTRATIONS.

(a) A deputy sheriff with sureties executes a bond to the sheriff conditioned that the deputy shall so demean himself in office that the sheriff shall not sustain any "damage or molestation" through him. In an action on the bond the sheriff shows in one case a judgment against him; and in another an arrest followed by judgment, but no payment of the judgments. The court rules that he is entitled to nominal damages only; but he submits to a non-suit, with leave to move for a new trial. A new trial is denied on the ground that there have been no damages, and that the word "molestation" does not enlarge the scope of the covenant.<sup>1</sup>

(b) W. gives a bond with sureties to V., which is construed to be a bond of indemnity against demands on a firm of which W. is a member. V. accepts drafts, and the holder sues V. and recovers judgment. V. pays a sum less than the face of the judgment, and assigns the bond to the holder. The judgment is entered satisfied, the holder undertaking, if he recovers on the bond the amount of the judgment, to repay the sum paid by V. In an action on the bond he recovers only the sum paid by V.<sup>2</sup>

(c) A. gives B. two notes to indemnify him for signing other notes as surety. The measure of damages is the amount paid by the plaintiff at any time before trial; in case no payment is made, nominal damages may be recovered.<sup>3</sup>

<sup>1</sup> *Gilbert v. Wiman*, 1 N. Y. 550; the court points out that this word occurs frequently in covenants for quiet enjoyment, and against incumbrances; but that nothing short of an eviction, or in the latter case, payment of money, will entitle a party to recover. This seems to show that in all such cases pecuniary damage is intended.

<sup>2</sup> *Valentine v. Wheeler*, 122 Mass. 566.

<sup>3</sup> *Osgood v. Osgood*, 39 N. H. 209; *Haseltine v. Guild*, 11 Id. 390. The rule that the plaintiff can recover anything paid down to the time of trial, and that he can in any case recover nominal damages, is entirely at variance with the principle on which these actions are founded. At common law, the defendant could always plead *non damnificatus*, and this was an answer, 1 Saunders, 116 n.; *Locke v. Homer*, 131 Mass. 93; but if the answer of *no damage* is a defence to

(d) The contract is to indemnify a mortgagee on selling timber. There being no evidence to show that the sale of the timber had any other effect of depreciation, the measure of damages is the price paid for it.<sup>1</sup>

---

PRINCIPAL AND SURETY. — Formerly the surety's action against the principal was either on special assumpsit, or on the common counts for *money paid, had, and received, or laid out and expended*, and as the technical rule was that the proof must correspond with the allegation, no recovery could be had for anything short of this. The rule was soon relaxed so as to make payment by negotiable paper, if accepted by the creditor as such, equivalent to payment of money; but it was not extended to other forms of security such as bonds.<sup>2</sup> Now that the common-law system of pleading has been swept away, however, the question presents itself in a different way. The question is not whether the surety has paid money, but whether, by the transfer of money's worth, property, or in any other way, he has discharged the obligation which he assumed. If the transaction according to the understanding between him and the creditor amounts to this, then he

the action, then damage is the gist of the action and there is no room for the application of the doctrine of nominal damages. So, too, if damage is the gist of the action, and there is no right of action at all, the suit cannot be kept open till the plaintiff has paid something. He has no right to begin the suit till he has paid something, for the reason that he may never have to pay anything. The rule as given above is believed to be in accordance with principle. In *Osgood v. Osgood*, 39 N. H. 209, contracts of indemnity are compared with the case of a covenant of warranty against incumbrances. But the cases are not alike; for if there is an outstanding incumbrance, then the covenant is immediately broken, and a right of action carrying nominal damages at once arises.

<sup>1</sup> *Curtis v. Baugh*, 79 Ill. 242.

<sup>2</sup> *Morrison v. Berkey*, 7 S. & R. 238.

is entitled to recover the amount of loss he has sustained in accomplishing it. Thus he may give a note, and if this, as between the parties, is received as payment, he may at once sue the principal.<sup>1</sup> So, where the land of a surety has been levied upon to satisfy the debt of the principal;<sup>2</sup> even under the old system of pleading, the debt was extinguished by a conveyance of land.<sup>3</sup> This matter, which may now be dismissed in a few words, is a good illustration of the effect which the abolition of the common-law rules of pleading has had in making the redress conform to the actual rights of the parties.

Where a judgment has been recovered against the surety and satisfied, this is competent evidence to show the amount of damages. It may be conclusive, as where the principal is notified of the action by the surety, and has an opportunity to defend.<sup>4</sup> But this is matter of evidence, and does not affect the measure of damages, which is always the loss or expense to which the surety has been put.

The surety instead of paying voluntarily may be compelled to pay by suit, or may suffer consequential loss. A frequent case is that of a bond to indemnify for all damage by reason of a suit or suits, or for "all suits, damages, and costs." In such cases counsel fees are always recoverable, this being the meaning of the contract.<sup>5</sup> When there is no such explicit guarantee, as when the bond is to pay "all damages," the rule seems to be the same,<sup>6</sup> and the rule should be the same where the guaranty is implied.

<sup>1</sup> *Peters v. Barnhill*, 1 Hill (S. C.), 234, 237.

<sup>2</sup> *Lord v. Staples*, 23 N. H. 448.

<sup>3</sup> *Ainslie v. Wilson*, 7 Cow. 662.

<sup>4</sup> *Hare v. Grant*, 77 N. C. 203; *Dubois v. Hermance*, 56 N. Y. 673; *Campbell v. Somerville*, 114 Mass. 334; *Insurance Cos. v. Thompson*, 95 U. S. 547.

<sup>5</sup> *Ripley v. Mosely*, 57 Me. 76; *Lindsey v. Parker*, 142 Mass. 583.

<sup>6</sup> *Finckh v. Evers*, 25 Oh. St. 82.

The general principle, excluding the allowance of counsel fees has been discussed elsewhere,<sup>1</sup> and it has been seen that when one is sued not on his own contract, but for the default of another, and he has a remedy over, counsel fees are a natural and necessary part of the damages.<sup>2</sup> But this is only when the suit is necessary;<sup>3</sup> and consequently it is usual for the surety to give notice of the suit, in order that the principal may come in and defend. If not given, the surety must, in his suit against the principal, show that it was necessary for him to pay the original claim, or to contest the original suit; if given, the result of the suit is conclusive upon the principal.<sup>4</sup> Notice, it will be seen, goes to the question of evidence, and does not affect the measure of damages.

#### RULE.

88. *When a surety or one holding an indemnity over is compelled by suit to pay the demand, his measure of damages is the amount paid, and also his costs, counsel fees, and reasonable expenses.*

In applying this rule it is essential to observe the precise scope of the indemnity, for it is only applicable when the contract, whether express or implied, is that the principal debtor shall answer for the *whole damage*. With regard to commercial paper, for instance, the first question as between two parties is what is the exact nature of the contract. Thus an indorser of a bill of exchange, sued by the indorsee, has been held not entitled to recover from

<sup>1</sup> Chapter III.

<sup>2</sup> *Westfield v. Mayo*, 122 Mass. 100.

<sup>3</sup> *Short v. Kalloway*, 11 A. & E. 28.

<sup>4</sup> *Duffield v. Scott*, 3 T. R. 374; *Smith v. Compton*, 3 B. & Adol. 407; *Brown v. Haven*, 37 Vt. 439.

the acceptor the costs incurred in such action, there being no privity between them.<sup>1</sup> And the payee of a note, who has indorsed it, and then been sued by the indorsee, cannot hold the maker for the costs of the suit,<sup>2</sup> probably because it was his duty upon his independent contract of indorsement to pay the note without suit. On the other hand, an accommodation indorser has been held to be a surety, and to have the right to recover the costs of a suit which he may be compelled to pay.<sup>3</sup>

---

**CONTRACTS OF INSURANCE.** — Fire insurance is a contract of indemnity by which the insurer, in consideration of a certain premium, agrees to make good to the assured for a certain time all loss or damage not exceeding a certain specified amount that may happen from the risk insured against. “It is not, strictly speaking, an insurance *of the property*, in the sense of a liability for the loss of the property by fire *to any one who may be the owner*. It is rather a personal contract with the person having a proprietary interest in it, that the property shall sustain no loss by fire within the time expressed in the policy. It is a personal contract which does not pass to the assignee of the property.”<sup>4</sup> This is what is called an *open policy*, and is the ordinary species of contract for insurance against fire. In marine insurance, it is common for the parties to put a fixed valuation on the property insured, in which case the contract is called a *valued policy*, and the plaintiff recovers this sum without regard to the actual loss. In the one case the sum insured is a limit, and the measure

<sup>1</sup> Dawson v. Morgan, 9 B. & C. 618.

<sup>2</sup> Simpson v. Griffin, 9 Johns. 131.

<sup>3</sup> Baker v. Martin, 3 Barb. 634.

<sup>4</sup> Per Shaw, C. J., King v. State M. F. Ins. Co., 7 Cush. 1.

of recovery is the actual loss within this limit; in the other the sum is a value agreed upon by the parties as an estimate of the loss, and is itself the measure of damages. It is to be noticed that most fire policies contain a clause authorizing the insurers, instead of paying in money, to rebuild or repair, on giving notice of his intention to do so. In this case, on their election to do so, a new contract to build or repair is substituted for the contract of insurance, and this new contract may itself be broken. The three ordinary cases under a fire policy, therefore, are: 1. Total loss; 2. Partial loss; 3. Election to reinstate, followed by breach. In all these cases the general rule may be thus expressed:—

#### RULE.

89. *On an open policy of fire insurance the measure of damages is such sum, within the limit of the risk, as will put the insured in as good a position as if no loss had occurred.*<sup>1</sup>

#### ILLUSTRATIONS.

(a) Property insured against fire is partly destroyed. The value of the property is greater than the sum insured. The insured is entitled to recover his whole loss, provided it does not exceed the amount insured.<sup>2</sup>

(b) Goods insured are totally destroyed. The measure of damages is the market value of the goods at the time and place of the fire.<sup>3</sup>

<sup>1</sup> It must be constantly borne in mind that in this and all other cases of attempts to state a rule of damages as to express contracts, the rule is based on a normal type of contract in common use, and is always subject in any given case to variation through modifications introduced by the parties.

<sup>2</sup> *Underhill v. Agawam M. F. I. Co.*, 6 Cush. 440.

<sup>3</sup> *Fowler v. Old North State I. Co.*, 74 N. C. 89.

(c) A policy on a house provides that, in the event of loss, the estimate is to be according to the "true and actual cash value" at the time. This means the value of the building as it stood on the ground at the time of its destruction, as compared with a new building of the same sort, — not the original cost, nor a sum sufficient to erect a new building, nor the difference in value of the lot with the building upon it and its value with the building destroyed.<sup>1</sup>

(d) An owner of land with buildings thereon conveys the land, reserving the buildings, provided that they shall be removed by him on October 1, and if not removed become the absolute property of the grantee of the land. The buildings are insured, and destroyed by fire in August. The owner is entitled to recover the actual intrinsic cash value of the buildings, or to such a sum as it would have cost at the time of the fire to have restored them to their previous condition, and not the value as subject to removal on October 1.<sup>2</sup>

(e) A policy provides that the insurers may repair, the insured contributing "one-fourth of the expense." The insurers, electing to comply with this provision, make repairs of substantial benefit, though not fully making good the loss. The defendants request an instruction that the measure of damages is "the sum which the plaintiff is damaged by the insufficiency of the defendants' repairs." The request is refused, and the jury is told that if the defendants have not fully repaired, no deduction can be made from the damage originally done, and that the jury should in that case "give the same damages to the plaintiff as if no repairs had been made." To these instructions the defendants except, and on appeal the exceptions are sustained, it being held that the true measure of damages is the difference between the value of the building as repaired in fact, and what the value would have been had the repairs been full and complete, taking into account the provision as to one-fourth.<sup>3</sup>

<sup>1</sup> *Ætna Ins. Co. v. Johnson*, 11 Bush, 587.

<sup>2</sup> *Washington Mills Manuf. Co. v. Weymouth Ins. Co.*, 135 Mass. 503. They might never have been removed. Cf. *Laurent v. Chat-ham Fire Ins. Co.*, 1 Hall, 41. Both cases are well considered and instructive.

<sup>3</sup> *Parker v. Eagle F. Ins. Co.*, 9 Gray, 152. As to this fourth, the

It is a general principal of the law of contracts that a person may enforce any agreement with regard to property of which he has lawful possession, and with which he has apparent power to deal, even though he is accountable over to another for the fruits of the contract, or damages for its breach; and *a fortiori* is this true if he has any legal interest or estate in it. It is a consequence of this rule that for breach of contract of insurance the measure of the recovery is not affected by the nature or extent of the legal interest of the assured in the property, unless, of course, it is expressly insured as such. A bailee, *e.g.*, a consignee or commission agent,<sup>1</sup> a warehouseman or wharfinger,<sup>2</sup> or, again, a vendor who has not received the purchase money,<sup>3</sup> may recover the whole amount insured, though he is responsible over to third persons for any amount beyond what is due him.

Beyond this, however, the law will not go, and what are called wager policies, or policies taken out by those who have no interest whatever, so that the transaction is a mere wager that the assured will recover the amount of the policy before he has paid a sufficient amount in premiums to make the transaction a losing one for him, are contrary to public policy, and illegal, on the ground that they are gaming contracts and create a temptation to destroy property (and the same is true of wager life policies as tending to create a temptation to destroy life). In the case of mortgages, three cases may arise; 1st, the

case is not very clear. The provision is for "one fourth of the expense;" yet the court says that, "when the repairs are imperfect," the insured should bear "not one fourth of the cost of repairs, but of their value to the estate."

<sup>1</sup> *Hough v. People's F. Ins. Co.*, 36 Md. 398; *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84; *Stillwell v. Staples*, 19 N. Y. 401.

<sup>2</sup> *Waters v. Monarch, F. & L. Ass. Co.*, 5 E. & B. 870.

<sup>3</sup> *Collingridge v. Royal Exch. Ass. Corp.* 3 Q. B. D. 173; *Ins. Co. v. Updegraff*, 21 Pa. St. 513.

mortgagor may insure his interest; 2d, the mortgagee may insure his interest; 3d, the mortgagor may insure the interest of the mortgagee for the latter's benefit. In the last case, which is the usual one, the insurance is merely an additional security for the money loaned, and on a loss any money paid goes to the mortgagee in reduction of the debt. If there is a surplus it belongs to the mortgagor.<sup>1</sup> If the mortgagee insures at his own expense it is held in Massachusetts that he recovers the whole loss, and cannot be called upon to account to the mortgagor, nor to assign his mortgage or any part of it to the insurers.<sup>2</sup> In such a case the mortgagee may recover the insurance money and also the mortgage debt, for the two contracts are independent of each other, the consideration of one being the money loaned, of the other the premiums paid.<sup>3</sup> In other jurisdictions the mortgagee in this case recovers the whole amount of the loss, but is required to assign his mortgage to the insurer<sup>4</sup>. In still others he is restricted to the amount of the loan unpaid at the date of the loss.<sup>5</sup> If the mortgagor insures his interest, he recovers the whole amount of his loss<sup>6</sup> even if his interest be reduced to a mere equity.<sup>7</sup> In the second case, the difference of view arises not from any difference as to the measure of damages, for the mortgagee recovers in every jurisdiction (in accordance with

<sup>1</sup> *King v. State M. F. I. Co.*, 7 Cush. 1; *Kernochan v. N. Y. Bowery F. I. Co.*, 17 N. Y. 428.

<sup>2</sup> *King v. State M. F. I. Co.*, 7 Cush. 1; *International Trust Co. v. Boardman*, 149 Mass. 158; *Burlingame v. Goodspeed*, 153 id. 24.

<sup>3</sup> *King v. State M. F. I. Co.*, *ubi sup.* See this case for a discussion of the whole subject by Shaw, C. J.

<sup>4</sup> *Carpenter v. Providence Washington I. Co.*, 16 Pet. 495. See opinion by Story, *J. Honore v. Lamar F. I. Co.*, 51 Ill. 409; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 541.

<sup>5</sup> *Carpenter v. Prov. Wash. I. Co.*, 16 Pet. 495; *Sussex Co. Mut. Ins. Co. v. Woodruff*, *ubi sup.*

<sup>6</sup> *Kernochan v. N. Y. Bowery F. I. Co.*, 17 N. Y. 428.

<sup>7</sup> *Strong v. Mfrs. Ins. Co.*, 10 Pick. 40.

the general rule given above) the full amount insured; but from a difference as to the precise relation in law or equity existing between the mortgagor, mortgagee, and insurer. If the view taken is that the mortgagee has no insurable interest except the *debt* due him, it necessarily follows that, this being extinguished by the payment on the policy, the insurers should be entitled to stand in his place; in this case the policy is regarded as a mere additional security for the debt. If it be considered that the mortgagee may, by paying the premiums, enter into an independent contract with the insurer, then he is entitled to recover the amount insured from the insurer, and still hold the property for the debt.

As between the two views, it must be said that so far as the mortgagor or insurer is concerned, their interests are not affected adversely in any way by holding the two contracts entirely independent of each other. The mortgagor is liable in any case for his debt, and no more; the insurer, for his contract, has received the consideration in premiums. The real question is one of public policy. Is the contract a mere wager policy?

It may be said, if the creditor is amply insured by the land, without the buildings, that his insurable interest in the latter is of a very trifling character; but in the not uncommon case of a security consisting in great part or mainly in the buildings, insurance against fire is an essential safeguard, and insurance in such a case does not in the least resemble a wager.

A frequent species of contract is that for reinsurance, the insurer protecting himself from liability on his policy by taking out a policy to indemnify himself against loss. On principles already explained, the first insurer (a loss having occurred) may at once sue the reinsurer, and recover the full amount, without having paid anything.<sup>1</sup>

<sup>1</sup> *Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235; *Blackstone v. Alemannia F. Ins. Co.*, 56 N. Y. 104.

Marine insurance was originally regarded as a contract of indemnity, the consideration being the premiums paid, and the agreement being, (1) to make good to the assured all losses (2) not exceeding a certain amount which may happen (3) to the subject assured (4) from certain definite risks (5) during a certain period. The rules governing this species of contract throw very little light upon the principles governing the measure of damages, partly because they are mainly derived, not from these principles, but from the view taken by the courts of the effect of an express contract very peculiar in its form, having its origin in mercantile custom, and its principles of interpretation drawn rather from what is called the law merchant than from the common law. Little more will be attempted here than to explain some of the peculiar rules which govern marine insurance.

Insurance may be effected either upon the vessel, the cargo, or the freight, or on all three; the risks commonly insured against are the "perils of the sea." Consequently the question which in the majority of cases first arises is one of proximate cause. Has the loss been caused by a peril of the sea? Thus, in a case already cited, where a wreck occurred in time of war, and there was an interference by troops, a part of the loss was held to be proximately caused by a peril of the sea, while a part was held to be due to the existence of hostilities.

It having been ascertained that the proximate cause of the loss is a peril insured against, three cases may arise,—(1) that of partial loss, (2) that of total loss, and (3) that of constructive total loss. And these cases may arise, (1) under an open policy, (2) under a valued policy. The difference between the two is, that under an open policy the amount of damages is determined by the language of the policy and the general principles of law; under a valued policy, which has in practice almost super-

seded the open policy, the agreed valuation is taken as a conclusive basis of settlement.

Under an open policy, if the loss is total, the rule of indemnity would be the value of the property lost. And here the rule still governs.

#### RULE.

90. *Under an open marine policy, the measure of damages is the actual value of the property lost.*

#### ILLUSTRATIONS.

(a) The property lost is the vessel. The measure of damages is not the cost, but the value, of the ship.<sup>1</sup>

(b) The property insured is the cargo. In ascertaining the value, the premium paid for insurance, and commissions and charges, must be added to the invoice price at the port of departure.<sup>2</sup>

A valued policy, which is the contract now generally in use, values the subject of insurance — *i. e.*, the ship, cargo, or freight — at a given sum, and is equivalent to an assessment of damages in the event of a total loss. It is, in this event, a substitute for the proof of the value of the thing insured under an open policy.<sup>3</sup> This does not mean that the insured can recover arbitrarily without regard to the amount of his loss; whenever it is necessary, the valuation will be opened, and the real facts inquired into. Of course it is understood that the valuation must not be fraudulent nor intended as a cover for a wager.<sup>4</sup> The cases can only be understood by bearing in mind that the valuation of the subject of insurance does not affect the general character of the contract or the general rules of

<sup>1</sup> *Snell v. Del. Ins. Co.*, 4 Dall. 430.

<sup>2</sup> *Usher v. Noble*, 12 East, 639.

<sup>3</sup> *Phillips on Insurance*, § 1188.

<sup>4</sup> *Ib.* 1183.

damages in any way, but merely adds a clause to the open policy to the effect that the parties have agreed that the subject of insurance shall be held proved to be worth a certain sum. The reason of the introduction of the valuation is merely that with the loading and discharge of cargoes and the earnings of a voyage, and wear and tear of a vessel, the actual value of the thing insured is continually changing, and hence a valuation in advance has been found to be for the interest of both parties.

### RULE.

91. *For a total loss under a valued policy, the measure of damages is the amount of the valuation. In other cases the valuation will be opened.*

### ILLUSTRATIONS.

(a) The insurance is on a cargo of flour for New Orleans, valued at \$4.50 per barrel. The measure of damages for a total loss is the amount of the valuation, not the market value in New Orleans.<sup>1</sup>

(b) Cargo is insured at £8000. This means a full cargo. If after discharging a part there is a total loss, the insured only recovers a proportionate share of the amount.<sup>2</sup>

Life insurance differs from fire and marine insurance in the fact that the contract is not one of indemnity. It is a contract to pay a given sum of money in a certain event, the consideration being the premiums paid. Here, as elsewhere, it is held generally that wager policies are invalid; that is, that the insured must have an interest in the life to warrant his taking out a policy. But the interest may be of almost any sort,—as that of a wife in the life of her husband, a child in that of its parent, a

<sup>1</sup> Portsmouth Ins. Co. v. Brazee, 16 Ohio, 81.

<sup>2</sup> Tobin v. Harford, 13 C. B. (N. S.) 791; 17 id. 528.

sister in that of a brother, or a creditor in that of his debtor; and the important point is that, the interest once established, the amount to be recovered is not measured by it, but by the policy.

#### RULE.

92. *On a policy of life insurance the sum insured is the measure of damages.*

#### ILLUSTRATIONS.

(a) D. effects insurance on his life payable to R. for \$1000, D. paying the premium himself, and owing R. \$140. The intention of the parties is that R. shall pay the balance to D.'s widow. R. is entitled, on the death of D., to recover the whole amount.<sup>1</sup>

(b) In a suit on a life policy, the trial judge charges as follows: "Where a man effects an insurance upon his life, the amount to be recovered is the amount insured; there can be no other measure. In such cases insurers are bound to the full amount of such insurance, without proof of the value of interest to that extent." This is not open to exception.<sup>2</sup>

It seems hardly necessary to pursue the subject of insurance further here. The foregoing rules and illustrations show that the general principles relating to damages are the same here as elsewhere. The contract of insurance assumes a great many forms, and the liquidation on a breach may present a question of extreme simplicity, as in the case just referred to, or one of extreme complexity, as in many cases of adjustment of the rights of ship, freight, and cargo under marine policy, in which expert adjusters have to be called in to assist the court; but in all cases the underlying principle is that whatever form the contract takes, or however difficult to calculate the exact amount of the injury, the plaintiff must be put in the same position as if the contract had not been broken.

<sup>1</sup> Am. L. & Health Ins. Co. v. Robertshaw, 26 Pa. St. 189.

<sup>2</sup> Trenton M. L. & F. I. Co. v. Johnson, 24 N. J. L. 576, 581, 587.

AGENCY. — The relation of principal and agent differs from that of master and servant in the fact that it is not a domestic relation, involving the idea of service as a sort of property; but may be treated as growing out of a contract, by which one engages to perform certain acts for the other, the principal being responsible to third persons for their performance. The field of agency covers everything which can be done by one person acting in the place and stead of another, and there is consequently hardly any limit to the questions that may arise relating to the measure of damages. The principal may bring an action against the agent to recover damages for breach of his duty as agent; and according as the agency was to sell, to buy, to insure, to rent, to manage, or to invest, the measure of damages will be different. The agent may bring an action against the principal for loss or damage incurred in performing the duties intrusted to him, and here again the extent of the recovery will depend upon the nature of the duties. The chief difference between the two cases will be that in the first, the breach being established, the question is one of the elements of injury and extent of recovery; in the latter the question is rather whether the loss or damage has been proximately caused by the agency.

Cases of agency are treated here under the head of contract, chiefly for the reason that the relation of principal and agent involves an undertaking or agreement by one person to do something for another, and that, there being an agreement *inter partes*, there would seem to be always a right to nominal damages as for a breach of contract.<sup>1</sup> It must be said, however, that violations of the duties of agency often assume the character of torts, as in the case of conversion,<sup>2</sup> and that the relation itself

<sup>1</sup> *Blot v. Boiceau*, 3 Comst. 78; *First Nat. Bk. v. Fourth Nat. Bk.*, 77 N. Y. 320.

<sup>2</sup> *Brown v. McGran*, 14 Pet. 479, 496.

differs from that involved in the ordinary notion of contract from the fact that it is an engagement not only to do something, but to do it for and in the stead of the other contracting party. It has been pointed out that ordinary contracts differ from torts in the fact that the plaintiff usually sues in the one case to recover the value of a bargain, in the other to recover for the consequences of an act. In the case of agency it may be either. Suit may be brought, exactly as in tort, to recover for some positive act in violation of instructions, or for the neglect of some positive duty implied in the relation ; very often therefore, whatever name we give the relation, the action will have the characteristics of an action of tort. On the other hand if the agency is for the purpose of securing to the principal the benefit of a bargain, the result will be like that in an action of contract.

Sometimes there will be an alternative rule of damages, for the principal may often, as in the case of a sale by his agent at an unauthorized time, disaffirm the sale, and bring an action for conversion, or affirming the sale, recover merely for the difference between what the property has realized, and what it would have realized at the time fixed. In the one case, in many jurisdictions he would be entitled to the benefit of the rule as to higher intermediate value ; in the other the damages would be measured solely by the actual loss. In general it may be said that there is almost no limit to the variety of forms which the measure of recovery in cases of agency may assume.

A suit by the agent against the principal for damages occasioned by performing his duties as agent closely resembles a suit on a contract of indemnity. The duty to indemnify in this case, however, needs no express contract to support it ; it springs from the relation of the parties to one another.

RULES.<sup>1</sup>

93. *In an action by principal against agent for breach of obligation as such, the measure of damages is the loss proximately caused.*
94. *In an action by agent against principal the measure of damages is any loss proximately caused by the discharge of the obligation of agency.*<sup>1</sup>

## ILLUSTRATIONS.

(a) A Pennsylvania bank sends a draft on a New York firm to a New York bank for collection. Through delay in presentation payment is refused, the drawees having failed; the draft is thereupon duly protested. In an action by the Pennsylvania bank against the New York bank, it does not appear that the remedy against the drawer has been exhausted; the plaintiff is only entitled to nominal damages.<sup>2</sup>

(b) On a second trial, it is proved to have been decided in a suit in Pennsylvania, that the drawer is discharged from all liability; the plaintiff is now entitled to recover the full amount of the draft.<sup>3</sup>

(c) A foreign merchant, in the habit of insuring for his correspondent here, receives an order to insure, which he fails to carry out in accordance with his instructions; he is liable to the same extent as if he were an underwriter.<sup>4</sup>

(d) In such a case, the measure of damages is the full amount of the loss, less the premium, for this the owner would have had to pay in any case. The rule does not mean that the agent becomes an underwriter; he cannot, if the property remains uninjured, maintain a suit for the premium.<sup>5</sup>

<sup>1</sup> The case closely resembles, if it is not identical with one of indemnity. The principal must make good, or indemnify the agent for any loss which occurred in carrying out his instructions.

<sup>2</sup> First Nat. Bk. v. Fourth Nat. Bk. 77 N. Y. 320.

<sup>3</sup> S. C. 89 N. Y. 412.

<sup>4</sup> De Tastett v. Cronisillat, 2 Wash. C. C. 132.

<sup>5</sup> Storer v. Eaton, 50 Me. 219.

(e) C. & Co., of Boston, direct their agents at Leghorn to invest the freight to be earned by their vessel between Havana and Leghorn, partly in tiles and partly in wrapping paper, and to re-ship to Havana. The agents at Leghorn invest the whole in wrapping paper. The actual value of the tiles at Havana is the measure of damages.<sup>1</sup>

(f) An agent directed to invest money in a first mortgage invests it in a second mortgage; the land is sold to satisfy the prior lien, and the investment is lost. The measure of damages is the amount of the loan.<sup>2</sup>

(g) An agent acting within the scope of his employment is obliged to defend a suit. He may recover the expenses of the suit from his principal.<sup>3</sup>

<sup>1</sup> *Bell v. Cunningham*, 3 Pet. 69. This case was decided in 1830. On the trial (5 Mason, 161, 171), the damages were left very much to the discretion of the jury. No doubt at the present day the court would prescribe the rule as above.

<sup>2</sup> *Shipherd v. Field*, 70 Ill. 438.

<sup>3</sup> *Stocking v. Sage*, 1 Conn. 519.

## CHAPTER XIX.

### CARRIERS.

MUCH of the confusion in the cases on the subject of contracts of carriage has arisen from the attempt to treat the carriage of passengers as if it were governed by the same principles as the carriage of goods. From the analysis of the subject of damages already made it is apparent that the determining factor in compensation is the nature and extent of the injury inflicted, and that the real reason why different principles govern in tort and contract is that in most cases the injury inflicted by a tort is radically different from that inflicted by a breach of contract. In the case of the contracts just mentioned, the rules of compensation can best be understood by bearing in mind that they present every variety of feature from that of a contract involving solely pecuniary injury, and the value of a bargain, to that of an injury the consequences of which fall only upon the person and personal rights. When a shipper makes a contract with a carrier, or employs a carrier, who is under a public duty to transport for all comers, to transport goods, we have the case of an ordinary commercial contract, and the measure of damages is governed by the rule in *Hadley v. Baxendale*. The suit is upon the contract, and the measure of damages is always modified by special facts within the contemplation of the parties. Many different species of injury may arise, but the question to be settled always is,—how much has been lost by the failure to deliver the goods

at the time and place fixed? Profits may be allowed, if contemplated, and sufficiently certain; the value of a sub-contract may be recovered if within the contemplation of the parties; in general it may be said that there is a striking similarity with the measure of damages for breach of contracts of sale.<sup>1</sup>

On the other hand, while the transportation of passengers involves the idea of a contract (the ordinary railway ticket is evidence of a contract, and even if no ticket is purchased a contract to carry on the one side and to pay on the other is necessarily implied), there is also a duty independent of contract arising from the fact that the contracting party is a common carrier,<sup>2</sup> and for a violation of this duty an action of tort will lie.<sup>3</sup> But besides this, whatever the nature of the action the injury falls primarily upon the person and personal rights. In the other case, that of the carriage of goods, the injury falls primarily upon property or contract rights. It is impossible that the law should apply the same measure of damages in the two cases.

---

**CARRIAGE OF GOODS.** — The carrier may refuse or neglect to transport; he may not deliver at all, or only in part; the property may suffer depreciation in his hands; there may be delay in transportation, through which the goods, when delivered, are diminished in quantity or depreciated in quality, or (merely from lapse of time) they may have declined in market value. He may deliver to the wrong

<sup>1</sup> *Illinois Central R. R. Co. v. Cobb*, 64 Ill. 128.

<sup>2</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357, 383.

<sup>3</sup> If it be maintained that the action of tort really rests on the negligence involved in the breach of the implied contract, the result so far as damages are concerned is not different.

person, or at the wrong time, or place. The injury in all these cases will not be the same ; nevertheless there is for them all a common standard of compensation, which is the value of the delivery of the article at the time and place, and in the condition in which it should have been delivered. This is the value of the bargain, and throughout the whole range of contracts relating to money or money's worth, as has been seen, when we speak of a normal or typical measure of damages, the value of the bargain is what we have in mind. There may, in addition to this, be all sorts of special damages, and on the other hand, the nature and extent of the diminution of the value will vary with the character and extent of the injury ; but what *measures* the damages, and is capable of statement in the form of a rule of law, is the diminution in the value of the bargain completely performed.

The value is always fixed at the place of destination. Ordinarily this presents no difficulty ; but where one carrier receives goods to be carried from A. to B., the intention of the shipper being that another carrier shall take them from B. to C., the ultimate point of destination, the intention of the parties may be that the liability of the carrier shall end at B., or that he shall see the articles delivered at C. This is a question of the interpretation of the contract, and the liability under it ; or, law and custom may fix the termination of the first carrier's liability at B., or extend it to C. The first point to be settled (the commonest case is that of connecting lines of railroad) is therefore, what is the point at which the carrier under the particular contract, and the rule of law existing in the jurisdiction, is bound to deliver ? The value at this point, when ascertained, will always govern. The time for estimating the value is necessarily the time fixed for delivery in the contract, or if there is none, a reasonable time.

At common law the duty of a common carrier is said

to be that of an insurer. That is, he is responsible for goods entrusted to him in any event. The only excuse available to him is the act of God (something out of the course of nature) or of the public enemy. Consequently, unless a special contract is made with him, the plaintiff in a case of non-delivery need show nothing more than this. To call the carrier an insurer is a metaphor. His duty at common law is to deliver; the mere fact of non-delivery entitles the plaintiff to compensation. It is not properly a question of negligence (for no amount of care will excuse), but one of absolute liability. This case seldom arises in modern times, because a special contract is generally made by means of a bill of lading; but the common-law liability must be always distinguished from the liability founded upon the idea of the requirement of a certain degree of care.

The duty of the common carrier arises principally from the public employment which he exercises,<sup>1</sup> still his right to payment in proportion to the risk he assumes is always recognized, and as the amount and kind of care required in the case of some articles is different from that which is necessary in the case of others (*e. g.*, jewels and money, perishable and fragile articles, explosives etc.)<sup>2</sup> he may refuse to undertake any liability beyond a specified pecuniary

<sup>1</sup> *Coggs v. Bernard*, 2 Ld. Ray. 909, 918; *Magnin v. Dinsmore*, 62 N. Y. 85, 39.

<sup>2</sup> It must not be supposed that this fact is in conflict with the remark made elsewhere, that on the question of liability there are no degrees of negligence. Negligence, for the purpose of establishing liability, is always the absence of the amount of care requisite under the circumstances, but what is proper care in one case is not in another. In New York a carrier may by express contract exempt himself even from liability for negligence. *Hopsapple v. Rome, W. & O. R. R. Co.*, 86 N. Y. 275; but the doctrine is local, opposed to public policy and the general current of authority. See the whole subject fully considered in *Railroad Co. v. Lockwood*, 17 Wall. 357.

limit, unless the owner discloses the value of the goods and pays an added price for the increased risk. Such restrictions if brought to the notice of the shipper are binding; and the carrier can now only be liable beyond the limit fixed (when the value is not disclosed) in case of negligence.<sup>1</sup> That is, he is no longer at common law bound to answer for loss in any event, but is liable solely for something which the law will regard as a wrong or breach of contract on his part. As the effect of the notice on the one side, and the failure to disclose the value on the other, amounts to an understanding incorporated in the contract of shipment, that the goods are not of exceptional value, it would seem as if any want of the ordinary care which would be expected of a bailee for hire in transporting articles would be enough. But, however this may be, legal negligence once established, the measure of damages cannot be affected by an attempt to restrict liability which has failed. Consequently in any case in which the notice is ineffectual, owing to the carrier's negligence, the measure of damages is governed by the ordinary rules.

#### RULE.

95. *For a carrier's failure to transport goods the measure of damages is the difference between the value of the goods at the time and place of breach, and what would have been their value at the time and place fixed for delivery.*<sup>2</sup>

<sup>1</sup> Jennings v. Grand Trunk Ry., 127 N. Y. 438, 450.

<sup>2</sup> Here, as elsewhere, the principle of avoidable consequences gives an alternative rule. If the circumstances are such that a prudent man would forward the goods by some other means, the measure of damages will be the difference in expense of such transportation. This is the more usual case of the two, but it is not the normal rule, because it does not represent the value of the bargain, but the expense of the plaintiff in avoiding the normal loss.

## ILLUSTRATIONS.

(a) A carrier agrees to transport lumber, railroad ties etc., from Canada to Boston. At the time of making the contract H. informs the company that he enters into it for the purpose of enabling him to make other contracts to sell and deliver railroad ties in Boston. For failure to transport, the measure of damages is the difference between the market price in Boston and Canada, at the time when the defendant should have performed, less the cost of transportation; the notice, not being of any contract actually entered into, is of no avail to increase the damages.<sup>1</sup>

(b) O. sues M. for refusal to transport grain from New York to Liverpool in the ship *Yorkshire* as agreed, at 16 pence sterling per bushel. The proof is that O. was ready to ship, but that M. refused to receive the grain; and that the price of freight to Liverpool rose from 16d. at the time of the contract to 19d. before the *Yorkshire* sailed; the trial judge directs the jury to give nominal damages. There must be a new trial; the measure of damages is the difference between the agreed and the market rate.<sup>2</sup>

(c) H. makes a contract with W. & Co., owners of the ship *Humboldt*, for tonnage from Calcutta to Boston on 150 tons of goods at \$14.50 per ton; the master fails to take the ship to Calcutta. The rate of tonnage at Calcutta at the time agreed upon is \$18.50 per ton. The measure of damages is \$600 with interest.<sup>3</sup>

(d) A carrier agrees with E., a salt dealer in Chicago, to transport salt for him from Bay City to Chicago by water. On breach, E. has it carried by rail in lots, as he wants it, and sues to recover the difference in cost of transportation. This is not the measure of damages if such a method of transportation is unprofitable. E. can only recover the difference in market value at the two places, less the cost of transportation as contracted for.<sup>4</sup>

<sup>1</sup> *Harvey v. Conn. & Pass. R. R. Co.*, 124 Mass. 421.

<sup>2</sup> *Ogden v. Marshall*, 4 Seld. 340. See this case explained in *Nelson v. Plimpton Fire-Proof E. Co.*, 55 N. Y. 480.

<sup>3</sup> *Higginson v. Weld*, 14 Gray, 165.

<sup>4</sup> *Ward's C. & P. L. Co. v. Elkins*, 34 Mich. 439; a prudent man

(e) C. tenders parcels for carriage to a railway company at the ordinary rate; the company refuses to transport, and C. is obliged to send them by a circuitous route and at a greater expense. He may recover for this, but not for a loss of business.<sup>1</sup>

(f) A carrier places unreasonable restrictions on a shipper, which discriminate against him, and refuses to receive his shipments unless he complies. He may recover for loss of custom by not being able to ship.<sup>2</sup>

(g) A railroad company undertakes to transport lumber for a plank road company from W., and deliver it at C., but fails to do so. Some of it is in consequence lost, and some delayed. The measure of damages is the difference between the value of the lumber at the two points, less the cost of transportation, provided that lumber of the kind and quantity required is obtainable at C.; in addition, natural consequences from the delay, stoppage of work, payment of wages, and expenses.<sup>3</sup>

(h) W. agrees with F. to be ready with a ship in the river

would not pursue such a course; the alternative rule failing, the ordinary measure of damages is applied.

<sup>1</sup> *Crouch v. Great Northern Ry. Co.*, 11 Ex. 742, POLLOCK, C. B., says that there was nothing in the declaration to warrant such a recovery. Had the declaration been properly framed, the question presented would have been a different one. The plaintiff was himself a carrier, who forwarded parcels by rail (as is done by express companies in the United States). This fact the defendants must have known, and also that inability to deliver would naturally injure the plaintiff's business. Such a loss would seem to be within the contemplation of the parties; the difficulty would be rather one of proof; but a case may easily arise where the business of a shipper might be totally destroyed by a railway company's refusal to transport. See case (f) above.

<sup>2</sup> *Lancashire & Y. Ry. Co. v. Gidlow*, L. R. 7 H. L. 517.

<sup>3</sup> *Pennsylvania R. R. Co. v. Titusville & P. Plank Road Co.*, 71 Pa. St., 350. Under the rule of avoidable consequences, the defendants may show that portable mills might have been erected and lumber manufactured by the plaintiff. *Ib.* 356. The report of the case is not very clear, but two distinct heads of damage, loss of property, and delay in delivering it, seem to be involved. Extra cost for different means of transportation as to part of the lumber was of course recoverable. *Ib.* 351.

Tyne, to receive a cargo of coal for Havre. He buys the coal at 10s. 6d. a ton. At the time fixed the ship is not ready, and owing to the custom of the colliery trade, W. cannot get a cargo of coal until he has a ship to carry it. He is therefore obliged to buy again at 1s. 6d. advance, and ships at an advanced rate of freight. His measure of damages is the increased freight, and also the difference in the cost of the coal.<sup>1</sup>

(i) R. agrees to furnish M. a boat for his use, to transport excursionists at four dollars a day. The boat is not furnished. R. knows of the intended use. The measure of damages (in the absence of evidence that M. hired or could have hired another boat) is what a similar boat would have been worth, taking into account the capacity of the boat, the state of weather and tide, and also evidence that M. had engaged passengers for the boat.<sup>2</sup>

#### RULE.

96. *For non-delivery the measure of damages is the value of the goods at the time and place fixed for delivery.*<sup>3</sup>

#### ILLUSTRATIONS.

(a) A cargo is shipped to Liverpool and not delivered. Before the shipment, the consignors had sold the cargo "to arrive" at £7 2s. 6d. per ton; the market value at the time when the ship should have arrived is £7 7s. 6d. The market value, less the unpaid freight, and not the price obtained on the sale "to arrive," is the measure of damages.<sup>4</sup>

<sup>1</sup> Featherston v. Wilkinson, L. R. 8 Ex. 122; consequential damages within the contemplation of the parties.

<sup>2</sup> Mace v. Ramsey, 74 N. C. 11. This case should be distinguished from the others. It is not an agreement to furnish transportation, or to carry; but to furnish the *means* of transportation.

<sup>3</sup> The rule as generally laid down includes the statement that unpaid freight must be deducted. But this is not an essential part of the rule; if the freight has been paid, it is not deducted.

<sup>4</sup> Rodocanachi v. Milburn, 18 Q. B. D. 67. This case is believed to state the true principle. Some remarks in one of the opinions in a leading New York case are opposed to it. In the New York case the

(b) Goods are shipped at New York for Boston; they are totally destroyed by fire while in the carrier's custody. The measure of damages is the value of the goods.<sup>1</sup>

carrier limits his liability to \$50, unless the value of the goods is stated by the shipper. The owner of goods ships them from New York to Memphis, sending to the consignees a bill with prices, amounting to \$1,491.50, accompanied by a letter advising them of the shipment to them for selection. To the carrier he does not disclose the value of the goods. There is evidence tending to show that the value of the goods in Memphis would have been from \$2300 to \$2500. The goods not being delivered, if notwithstanding the limitation of liability the carrier is still liable for negligence, the measure of damages is held not to be the value in Memphis, but the price fixed by the consignor, on the ground that the benefit of the contract could have been no more; and no other value could have been in the contemplation of both parties. *Magnin v. Dinsmore*, 53 N. Y. 652; 56 id. 168; 62 id. 35; 70 id. 410. But if the exemption fails, and the liability as common carrier attaches, surely the value as between shipper and consignee is no concern of the carrier. Suppose the goods had been jewels, inherited by the consignor, and consigned for the purpose of a gift, to be selected by the consignee, would the fact that they had cost the consignor nothing affect his right to recover the actual value at the place of delivery? The benefit of the contract is the advantage to be had from delivery in Memphis, not the benefit of a possible sale of which the carrier knew nothing. The parties could contemplate nothing but the loss of the value of the goods in Memphis, whatever that might be. But the case of *Magnin v. Dinsmore* really turned on a wholly different point, — the question of liability. The question involved in the decision in which the measure of damages is discussed was: Did the silence of the plaintiff as to value amount to legal fraud which would relieve the defendant from any responsibility beyond the limit of \$50? and it was held that it did, unless there was some "misfeasance," or "abandonment of his character as carrier." 62 N. Y. 45. The result was that the case ended in the affirmance of a verdict for \$50 and interest, and the remarks of FOLGER, J., as to the measure of damages, are *obiter*. The cases on this subject present more than ordinary difficulty, because "negligence" sometimes means mere failure to deliver (although at common law, as already explained, there was really no question of negligence at all), sometimes carelessness. The confusion recalls that between "malice in law," and "malice in fact." See *Rathbone v. N. C. Central & H. R. R. Co.*, 140 N. Y. 48.

<sup>1</sup> *Faulkner v. Hart*, 82 N. Y. 413.

(c) A carrier fails to deliver a cargo of lumber at Buenos Ayres. The measure of damages is the value of the lumber at the time when and place where it should have been delivered, with interest.<sup>1</sup>

(d) A carrier contracts to carry hogs to N., it being the intention of the consignor to take them on to S. to market. The measure of damages is the difference in value at N., not at S.<sup>2</sup>

### RULE.

97. *For injury during transportation, the measure of damages is the difference between the value of the goods at the time and place of delivery, as damaged, and what it would have been had they been delivered in good order.*

### ILLUSTRATIONS.

(a) Butterine shipped to New Orleans is damaged on the way through the carrier's negligence, and sold on arrival at its market value, 7½ cents per pound. Had it arrived in good order the market value would have been from 15 to 16 cents per pound. The plaintiff is entitled to the difference with interest.<sup>3</sup>

(b) A cargo of beans, to some extent injured, may easily be dried by the carrier, and saved from further injury. This is not done. The owner's measure of damages is the difference between the damage which they would probably have sustained if dried, and that which they actually sustained by being carried to the port of destination undried, less the expenses of drying.<sup>4</sup>

(c) W., a cap manufacturer, delivers to a carrier cloth bought to make up into caps, to be carried to M. Owing to delay in delivery, he loses the season; the carrier knows nothing as to his business or intentions. His measure of damages are not the profits he might have made, but the diminution in value of the goods owing to the time for finding customers having passed.<sup>5</sup>

<sup>1</sup> Spring v. Haskell, 4 All. 112.

<sup>2</sup> Sangamon & M. R. R. Co. v. Henry, 14 Ill. 156.

<sup>3</sup> Western Mfg. Co. v. The Guiding Star, 37 Fed. R. 641.

<sup>4</sup> Notara v. Henderson, L. R., 7 Q. B. 225.

<sup>5</sup> Wilson v. Lancashire & Y. Ry. Co., 9 C. B. (N. S.) 632. In this

(d) The action is for injuries to a jackass. Special damages are claimed on the ground that the animal was bought for the sole purpose of being stood for service, and that the value of his use for this purpose for the season was \$400. The highest estimate of diminution in actual value is \$200, but there is also proof that it is much less. The jury are instructed that plaintiff may recover the value of the use. There is a verdict for \$200. There must be a new trial; there is nothing to show that defendant knew of the intended use; nor is there any proof of outstanding contracts for service. The mere fact that the verdict is for \$200 does not show that the jury was not influenced by the charge allowing the recovery of profits.<sup>1</sup>

(e) B., a carrier, agrees with H. to forward two pictures for him from London to Paris. Defendant agrees with B. to transport them; the pictures fall into the sea and are damaged. H. brings an action against B., who is advised rightly that he has no defence, and who notifies the defendant. The defendant lets the action take its course; B. defends and is defeated. B. may now recover of the defendant the damages assessed as the injury to the pictures in the first action, but not the costs of the unsuccessful defence. They are not a natural consequence of the defendant's default.<sup>2</sup>

#### RULE.

98. *For delay the measure of damages is the difference between the value of the goods at the time and place fixed for delivery and at the time and place of their actual delivery.*

case BYLES, J., distinguishes between profits, as including the increased value from the special use to which plaintiff intended to apply the goods, from diminution in exchangeable value, as so much subtracted from the inherent value of it, p. 645. This distinction, however, is only incidental, for profits may be measurable solely by market value. In such cases as the above the reason why the plaintiff cannot recover profits as such is that there is no certainty that he would have made any.

<sup>1</sup> Chicago, B. & Q. R. R. Co. v. Hale, 83 Ill. 360.

<sup>2</sup> Baxendale v. London, C. & D. Ry. Co., L. R., 10 Ex. 35.

## ILLUSTRATIONS.

(a) A carrier unreasonably delays the delivery of goods entrusted to him for carriage, and their market value meanwhile falls. The court charges that the measure of damages is interest during the period of delay. The plaintiff's contention is that he is entitled to recover the difference between the market value of the goods at the time and place of actual delivery and at the time and place fixed for delivery. The latter is the true rule.<sup>1</sup>

(b) The contract is to deliver cotton to S. in Boston; S. sells it in anticipation of arrival, and before the delivery to the carrier, and contends that the decline in market value between the date of the sale and the actual arrival of the cotton is the measure of damages. The ordinary measure of damages is the true one; the carrier had no notice of the sale "to arrive."<sup>2</sup>

(c) A hop-grower sends to London by rail some pockets of hops, consigned to a purchaser. Owing to delay the hops are damaged by wet, and the purchaser, as he is entitled to do, refuses to receive them. The consignor dries the hops, thus making them as good as before for actual use, but meantime the market has fallen. He sells the hops, and is entitled to recover from the carrier the difference between what they bring and what they would have brought if delivered in time.<sup>3</sup>

(d) H. is under a contract to supply a quantity of military shoes at a certain time, in London, at an unusually high price. He delivers them to a railway company, with a notice of the contract, and that unless so delivered the shoes will be thrown back on his hands; but no notice is given of the price. The shoes are not delivered within the time fixed. The measure of damages is the expense and loss on a re-sale at the market price,

<sup>1</sup> *Cutting v. Grand Trunk Ry. Co.*, 13 All. 381; s. p. *Weston v. Grand Trunk Ry. Co.*, 54 Me. 376; acc. *Sherman v. Hudson R. R. Co.*, 64 N. Y. 254.

<sup>2</sup> *Scott v. Boston & N. O. S. S. Co.*, 106 Mass. 468.

<sup>3</sup> *Collard v. South Eastern Ry. Co.*, 7 H. & N. 79. In such cases as this, it is to be taken for granted that the price in the contract, and the price on the re-sale are the best evidence of actual value.

not the difference between the price obtained on a re-sale, and the exceptional price fixed in the first contract; the parties did not contemplate it.<sup>1</sup>

(e) The contract is to transport live stock to Chicago. It should have arrived in time for the market on Thursday, but does not arrive till Friday, and there is no available market until Monday. It is sold on Monday, Tuesday, and Wednesday. If it could all have been sold on Monday, there can be no recovery beyond that day. The measure of damages includes depreciation in value, shrinkage in weight, the expense of keep, and interest.<sup>2</sup>

(f) The action is for damages to ink through freezing, owing to delay in transportation. The measure of damages is any loss or depreciation in value owing to this cause; the plaintiff cannot recover for time lost in waiting for the ink; such damage is not direct.<sup>3</sup>

(g) A commercial traveller delivers a parcel containing sam-

<sup>1</sup> *Horne v. Midland Ry. Co.*, L. R., 7 C. P. 583. The opposite conclusion seems to have been reached in *Illinois Central R. Co. v. Cobb*, 64 Ill. 128, in which case the shipper was allowed to recover on the basis of the price fixed in the contract. The rule in the English case seems the true one. The carrier can hardly be supposed to contemplate a loss, the extent of which he has no means of knowing.

<sup>2</sup> *Ayres v. Chicago & N. W. Ry. Co.*, 75 Wis. 215. The expenses of keep in the case of live-stock transported to market would seem to be consequential damages within the contemplation of the parties.

<sup>3</sup> *Ingledeu v. Northern R. R.*, 7 Gray, 86. The damages are not direct, because the measure of damages involved in the cause of action for delay is solely the difference in value of the goods at the time when they should have been, and when they have been delivered; anything else is consequential upon this. But THOMAS, J., goes on to say that they are remote. This is a *dictum*, and may well be questioned. Nothing would seem to be less unlikely than that the owner of goods should lose time through waiting for them when delivery is delayed. Such damages, however, not being direct, *i. e.*, necessary, they could not be recovered without being specially alleged, and the attempt in this case seems to have been to recover them under a general allegation of damage. Cf. *Hales v. London & N. W. Ry. Co.*, 4 B. & S. 66, in which damages for money spent in looking for the goods were allowed.

ples of jewelry to a carrier at Oxford, to be conveyed to Liverpool. The carrier is not notified of the contents of the parcel, or purpose of the consignment. There is a delay in delivery, and the plaintiff meantime remains waiting at a hotel, making inquiries. He cannot recover the amount of his hotel bill.<sup>1</sup>

(h) A quantity of wool is delivered to a railway to be carried to Boston, and the carrier is notified that the goods are sold at a price given, provided they are delivered in time. Owing to delay there is depreciation. The measure of damages is the difference between the value when delivered, and the contract price, together with expenses incurred in looking up the wool, and interest on both sums.<sup>2</sup>

### RULE.

99. *If the goods are not diminished in value, the measure of damages for delay is the value of their use during the period of delay.*

### ILLUSTRATIONS.

(a) The action is against a carrier for delay in forwarding money. The measure of damages is the interest on the money during the period of delay.<sup>3</sup>

(b) The action is for delay in delivering machinery. The measure of damages is the value of the use of the machinery; or the sum for which the plaintiff might have hired like machinery.<sup>4</sup>

Cases may arise involving delay, non-delivery, and refusal to transport. The value which the goods would

<sup>1</sup> Woodger v. Great Western Ry. Co., L. R., 2 C. P. 318. BOVILL, C.J., gives as a reason that such damages were not within the contemplation of the parties. But there is another reason more conclusive, — that his hotel expenses represent the cost of his entire board and lodging during the period of delay. This entire sum is not an expense caused by the delay, for he must have been at expense for both in any case, — very likely at the same expense.

<sup>2</sup> Deming v. Grand Trunk R. R. Co., 48 N. H. 455.

<sup>3</sup> U. S. Express Co. v. Haines, 67 Ill. 137.

<sup>4</sup> Priestly v. Northern Indiana & C. R. R. Co., 26 Ill. 205.

have had if delivered properly, still governs. V. contracts with L., a produce dealer, to carry a quantity of peas from Canada to New York, but fails to carry them further than Burlington, owing to the freezing of the waterways beyond that point. L., being unable to obtain them in any other way, replevies them at Burlington, and sends them to Boston for a market; this is found to be a prudent course. The measure of damages is the difference between what they would have brought at New York if delivered at the proper time, and the amount realized at Boston, with interest.<sup>1</sup>

In the case of misdelivery, the carrier may deliver to an unauthorized person, or deliver to the owner, but at a wrong place or time. In the first case the act amounts to a conversion, and the measure of damages is consequently the same as in the case of non-delivery, — the value of the goods, with interest, less the unpaid freight.<sup>2</sup> If the owner receives them at the wrong time or place, he will be entitled to his actual damages, whatever they may be. They may be merely nominal;<sup>3</sup> or they may amount to the cost of removing the goods to the place where they should have been delivered.<sup>4</sup>

As a general rule the measure of damages for loss or delay in transporting goods does not differ in Admiralty from that of the Common Law. An exception is said to be necessary in the case of long sea voyages,<sup>5</sup> when there is merely a fall in market value between the time when the goods ought to have been delivered and the time when they are delivered. The reasons given are, first, that goods may be easily sold "to arrive;" that is, that the

<sup>1</sup> *Laurent v. Vaughn*, 30 Vt. 90.

<sup>2</sup> *Forbes v. Boston & Lowell R. R. Co.*, 133 Mass. 154.

<sup>3</sup> *Rosenfield v. Express Co.*, 1 Woods, 131.

<sup>4</sup> *Chicago & N. W. Ry. Co. v. Stanbro*, 87 Ill. 195.

<sup>5</sup> *The Parana*, 1 P. D. 452; 2 P. D. 118.

owner may protect himself against loss; second, that there is no certainty that they will be sold immediately on arrival. But the difficulty with this reasoning is that a shipper is not bound to sell the goods at all, and even if he does sell them, or intends to sell them, this does not affect the undertaking of the shipper in any way, which is simply to be responsible for the delivery of goods at a certain time and place. If the value of the goods then and there does not fix the damages, what other guide is there?

---

**CARRIAGE OF PASSENGERS.** — The contract or duty to carry passengers is of an entirely different description. The injury falls directly upon the person, and the consequences of this are in most cases not distinguishable from those of a tort. On the other hand, as there is in every case a contract to carry, consequential damages, as for injury to business, etc., may be recovered under the rule in *Hadley v. Baxendale*, and notice will therefore often affect the measure of the recovery. Owing to the fact that negligence may be the foundation of the action, and that this negligence may be treated as neglect to perform the duties of the contract, or as neglect to perform the duties imposed upon any one in the position of carrier, it is often impossible to say whether the action is one of tort or contract. The result is that to lay down any rule which will be of much use as a guide, is extremely difficult. It should be noticed that a carrier of passengers is not an insurer. His duty is to carry safely all persons who apply for passage.<sup>1</sup> The difficulties which surround the subject, and the way in which the courts meet them,

<sup>1</sup> *Phila. & Reading R. R. Co. v. Derby*, 14 How. 468; *Pearson v. Duane*, 4 Wall. 605.

can best be seen by a few illustrations. The principal question involved in the cases will generally be found to be, not the measure of damages, which is always the benefit of the contract to carry safely, or the proximate consequences of the breach of duty considered as a tort, but that of proximate cause. For instance, in a leading English case,<sup>1</sup> the plaintiff, his wife, and two children, ~~are~~ set down at the wrong station; they cannot get a conveyance and ~~are~~ obliged to walk; the wife catches cold, and is laid up for some time. ~~It is held~~ that there can be no recovery for the expenses of the illness; ~~because~~ it was not within the contemplation of the parties, nor a probable consequence of having to walk home. Now the question whether the illness is the natural result of the exposure is obviously a question of proximate cause, just as much so as if the action had been one for personal injury. Upon the whole there seems no reason why, in this very peculiar class of contracts, the agreement should not be regarded as including an undertaking to carry so that there shall be no personal injury (this is what carrying safely means); and in that case the question will simply be whether the illness, expenses of cure, etc., were caused by the breach of contract, or tort. This question should be for the jury. It has been seen<sup>2</sup> that in *Hobbs v. London & S. W. Ry. Co.*, the right to recover for the exposure was treated as a question for the court, because the action was treated as an action of contract; but where the contract is of such a nature that the effect of the breach of it is similar to that of a tort, the reason for the rule ceases.

The cause of action is neglect to transport the passen-

<sup>1</sup> *Hobbs v. London & S. W. Ry. Co.*, L. R., 10 Q. B. 111. Great doubt is thrown on this decision by the opinions of BRAMWELL and BRETT, L. J., in *McMahon v. Field*, 7 Q. B. D. 591.

<sup>2</sup> *Ante*, p. 64.

ger across the Isthmus of Panama, according to contract. The trial judge leaves it to the jury to determine whether a subsequent illness of the plaintiff's is due to the defendant's neglect. This is held to be the proper course; and the jury having found in the plaintiff's favor on this point, he may recover the expense of such illness.<sup>1</sup> The plaintiffs are left at night in a place where no houses are to be seen, and at a distance from their destination. They walk to their destination, and the jury find this to have been a reasonable act. The exposure results in a miscarriage, which the jury find to have been due to the condition of the female plaintiff's health. Recovery may be had for the expenses of the consequent illness.<sup>2</sup> As the primary consequence of the mere failure to transport, or delay in transportation, or transportation to the wrong place, is inconvenience, the natural act of the passenger is to reduce this to a minimum by taking another conveyance to his destination; and, as in the case of goods, the added expense will usually be his measure of damages. But of course the expense to which he goes must be reasonable. A good test is, — would the passenger have taken the conveyance and incurred the expense, whatever it may be, if his situation was due to mere accident, or his own fault, and he had no one to look to for compensation?<sup>3</sup>

In these cases an inquiry usually particularly pertinent is whether the damage is really caused by the failure to transport, or to something else. A case in the Supreme Court of the United States illustrates this. The action is brought to recover damages for failure to transport the plaintiff from Acapulco to San Francisco. The evidence is that the plaintiff had been banished from San Francisco

<sup>1</sup> *Williams v. Vanderbilt*, 28 N. Y. 217.

<sup>2</sup> *Brown v. Chicago, M. & S. P. Ry. Co.*, 54 Wis. 342.

<sup>3</sup> *Le Blanche v. London & N. W. Ry. Co.*, 1 C. P. D. 286.

by a Vigilance Committee, an organization having complete control of the city, under penalty of death in case of return. On discovering the facts, the master, from motives of humanity, puts him on board a ship which takes him to New York, where he remains for four years. The Vigilance Committee having ceased to exist, he then returns to California, where he brings suit, claiming damages on the ground that all efforts to get back were unavailing, and recovers a verdict for four thousand dollars. The court reduces the verdict to fifty dollars. The reason he could not get back to California was that no ship would take him; and had it been otherwise, his return under the circumstances would not have been the act of a prudent man.<sup>1</sup> This case was one of a libel in admiralty, but common-law principles of damages fully apply. In *Brown v. Memphis & C. R. R. Co.*,<sup>2</sup> it is suggested that the damages allowed by the Supreme Court in this case were punitive, and not compensatory. It is true that exemplary damages may be given in admiralty;<sup>3</sup> but in *Pearson v. Duane* there seems to have been no ground for exemplary damages. What the plaintiff lost was the difference in expense to him of being in Acapulco and New York. The expense of getting back to Acapulco was the full extent of his damages, and this would have been represented by about the sum allowed. No money had been paid as fare.

<sup>1</sup> *Pearson v. Duane*, 4 Wall. 605.

<sup>2</sup> 7 Fed. R. 51, 64.

<sup>3</sup> Per Story, J., in *Boston Mfg. Co. v. Fiske*, 2 Mason, 119.

## CHAPTER XX.

### TELEGRAPHIC DESPATCHES.

THE liability for non-delivery or mis-delivery of telegraphic despatches has been sometimes discussed as if it resembled that of carriers; but the points of resemblance are not many. It is settled that telegraph companies are not in law common carriers,<sup>1</sup> and a telegraphic contract relates to the carriage neither of goods nor persons. The contract is that intelligence or information of some kind shall be conveyed by means of an electric current to some one at a distance. Negligence or breach of contract must be the foundation of the action; and as to this, there seems to be a difference between the view taken by the English and the American courts, the former holding that while the sender may have an action of contract, the person for whom the message is intended has no right of action at all,<sup>2</sup> the latter that the person to whom the message is addressed has an interest sufficient to support an action.<sup>3</sup> The action, according to the circumstances, may be in contract or in tort, — may combine the features of both, or may not make it clear which ground of liability is to be regarded as the basis of the

<sup>1</sup> *Kiley v. Western U. T. Co.*, 109 N. Y. 231; *Grinnell v. Western U. T. Co.*, 113 Mass. 299.

<sup>2</sup> *Playford v. United Kingdom E. T. Co.*, L. R., 4 Q. B. 706; *Dickson v. Reuter's T. Co.*, 2 C. P. D. 62; 3 *id.* 1.

<sup>3</sup> For a full collection of authorities, see 25 *Am. & Eng. Encycl. of Law*, 825-828.

claim; the damages allowed depend upon the view taken of the nature of the injury, which may be of any description, pecuniary or personal. While the form of the action may be, and often is, regarded as unimportant, the guiding principles of proof and assessment of damages are always in force. In the case of commercial despatches we do not find damages for mental distress; the value of the use of money still continues to be interest; cases of messages affecting the person or domestic relations are treated in a wholly different manner from those affecting pecuniary interests.

The liability of telegraph companies and the principles which govern the assessment of damages for non-delivery or delay, have been recently stated by the Supreme Court of the United States upon a full review of the authorities. Such companies exercise a public employment, and are bound to serve all alike. They are not, however, common carriers, nor even bailees. The message is in itself of no value, and the measure of damages has no relation to any value of the message, except so far as the value may be disclosed by the despatch itself, or be agreed between the sender and the company. The company may restrict its liability by reasonable regulations, and it is a reasonable regulation to require the repetition of the message from the place of destination if the sender wishes to insure accuracy; and to provide that for mistakes in unrepeatable messages the company will not be liable beyond the cost of transmission. To fix the company with liability for substantial damages in contract, the rule in *Hadley v. Baxendale* must be applied, and consequently for loss, in the case of unintelligible despatches, or messages in cipher, there is no liability.<sup>1</sup> Such is the general result of the authorities. When it is said that the message itself has no value, it is not meant that correct delivery of the

<sup>1</sup> *Primrose v. Western U. T. Co.*, 154 U. S. 1.

message has none ; but as to this, owing to the nature of the contract, it is impossible to say that there is any general standard by which the value can be measured. Despatches divide themselves broadly into two classes, — commercial or business messages, when the interests affected relate to money or money's worth, and non-commercial messages, when the interests affected may be of any other kind. Commercial messages come within the operation of the rule of *Hadley v. Baxendale* as far as they convey to the telegraph company a more or less intelligible idea of the object intended to be affected by the result.

Perhaps, owing to the difference in the nature of the business, courts seem to find the difficulty in the way of holding telegraph companies liable for consequential damages, under the rule of the contemplation of the parties, less than in the case of carriers. The telegraph company conveys intelligence, and always has (except in the case of unintelligible or cipher despatches) some notice of the object of the correspondence ; the mind of the operator must necessarily be directed to the meaning of the despatch in order to transmit it properly. The carrier's business, on the other hand, is simply to carry, and except so far as there may be a voluntary disclosure, or so far as he may, to protect himself, require the shipper to disclose, he does not even know the nature of the thing carried, far less the object in view. Consequently the proof of contemplation by both parties is more easy in the one case than in the other. Without very careful comparison of all the circumstances, it will not do to assume that a decision in a case against a telegraph company as to the contemplation of the parties will have any force or application in a case against a carrier.

With regard to the question of proximate cause great difficulties are presented because the question so often

arises whether, had the message been received, it would have been acted upon, and whether the real cause of the loss is not the independent act of one of the parties.

In many cases the question of the allowance of damages for mental suffering is involved, *e. g.*, despatches relating to family events affecting the feelings, such as births, deaths, or funerals, or despatches summoning physicians to the bed-side of near relatives. In these cases the plaintiff cannot recover merely by saying that he has been caused mental suffering. He must present a case which imports mental suffering. From what has been said already about mental suffering it may be inferred that there is great conflict on the subject in this class of cases. Courts which, relying on the often quoted dictum in *Lynch v. Knight*, take as their guide a supposed rule of law that no damages for mental suffering can be allowed unless physical suffering is involved, must exclude such damages; courts which hold it to be the absolute rule that when the form of the action is contract no damages for mental suffering can be recovered, must exclude such proof in all cases in which the sender brings an action sounding in contract. It must be said, also, that grave difficulty in the way of proof is apt to surround the claim. But on principle, in a case free from doubt, there seems often more reason for allowing proof of mental suffering here than in cases involving physical injury. Indeed if the allowance of damages for mental distress in every case of physical pain were a new question, it would seem very doubtful whether one is really a normal consequence of the other. In a court of common law, mental distress is an ordinary result of a fracture of the arm, or collar-bone. But what is really meant is fright, not injured feelings.

For failure to convey intelligence there cannot in the nature of things be any normal rule of damages; no idea of the nature and extent of the injury is logically im-

ported until we know what was the intelligence to be conveyed.

#### ILLUSTRATIONS.

(a) A message directed to E. is delivered by M. at the telegraph station of the defendant in the name of, and purporting to be from the cashier of a bank. It conveys the information that the bank will pay checks of M. to the amount of \$20,000. M. is known to the operators who transmit the message, and known by them to have written it; the transaction as a whole is such that it is gross negligence to forward it. Relying on the despatch, E. cashes M.'s check for \$10,000, and gives him credit for \$10,000. The whole transaction being a fraud, the company is liable for the amount of the loss.<sup>1</sup>

(b) A despatch is left by B. with a telegraph company to be sent to Chicago, directing the purchase of 10,000 bushels of corn. As transmitted it directs the purchase of 1000 bushels. The mistake being discovered, the balance of 9000 bushels is purchased by B., but at ten cents more per bushel than he could have bought for, at the time of the delivery of the original despatch. The measure of damages is \$900 with interest.<sup>2</sup>

(c) A message orders the purchase of stock, which advances between the time the message should have arrived and the time of purchase under another order; the advance is the measure of damages.<sup>3</sup>

(d) Dealers in pork at Boston receive a letter from dealers at Buffalo, offering to sell a lot of hogs; after correspondence they send a despatch, "will take your hogs at your offer." Delivery is unreasonably delayed, and the Buffalo dealers sell the hogs to another person. The measure of damages is the difference between the agreed price and the sum which the Boston dealers would have been compelled to pay at the place fixed for delivery, to replace themselves.<sup>4</sup>

<sup>1</sup> *Elwood v. Western U. T. Co.* 45 N. Y. 549.

<sup>2</sup> *Bartlett v. Western U. T. Co.* 62 Me. 209.

<sup>3</sup> *United States T. Co. v. Wenger*, 55 Pa. St. 262.

<sup>4</sup> *Squire v. Western U. T. Co.* 98 Mass. 232; *acc. True v. International T. Co.*, 60 Me. 9.

(e) The despatch reads, "Send bay horse to-day, Mock loads to-night." Mock is a well-known buyer, in the habit of shipping horses from the vicinity, presumably known as such to the defendant's agent. The owner can recover for the loss of the sale.<sup>1</sup>

(f) L. & D., manufacturers of salt at Syracuse, have an agent at Chicago, and another at Oswego, which is their shipping port. The agent at Chicago telegraphs to the agent at Oswego, "send 5000 sacks of salt immediately." Through the negligence of the company the message as delivered reads "casks" instead of "sacks." The despatch as sent would have meant sacks of fine salt, at fourteen pounds each; as altered it means coarse salt, in casks of 320 pounds each. Five thousand casks of coarse salt are sent; on arrival at Chicago, there being no market for it, it is sold for less than the market value at Oswego. In an action against the company the shippers can recover the difference, together with the expense of transportation to Chicago.<sup>2</sup>

(g) The message, read in the light of well-known usage in commercial correspondence, and in view of other circumstances within the knowledge of both parties, reasonably informs the operator that it relates to a business transaction, disclosing its nature so far as necessary to accomplish the purpose for which it is sent; it does not disclose the precise terms nor inform the

<sup>1</sup> Thompson v. Western U. T. Co., 64 Wis. 531.

<sup>2</sup> Leonard v. New York, A. & B. E. M. T. Co., 41 N. Y. 544. The rule of damages is said by the court of appeals to have been "sufficiently favorable to the defendants," p. 567. Of course, in such a case the verdict stands. It was argued that the plaintiffs should have sent the salt back to Chicago; but there was nothing in the case to show that this would have been a prudent course. The damages allowed are treated in the opinion of EARL, C. J., as coming under the rule of the contemplation of the parties; there was however no proof that the company knew that the salt was shipped for sale, but this is not necessary to the decision. The company's negligence was the efficient cause which led to the salt being in Chicago instead of Oswego. But for this negligence the salt would have still been in Oswego. The company must, therefore, be liable for the consequent damage, which is the rule adopted by the court.

operator as to the amount of damage likely to result. The plaintiff may recover consequential damages.<sup>1</sup>

(h) C. sends a despatch directing his agent to ship a horse to V. As transmitted the despatch is an order to ship the horse to N.; this is done, and as the agent goes away, C. cannot for some time ascertain what has become of the horse. He may recover substantial damages.<sup>2</sup>

(i) A despatch contains information of the arrival of a barge for the purpose of shipping staves. It is not delivered for thirty hours, so that plaintiff cannot use it to get the staves, and they are swept away by an extraordinary flood. The measure of damages is the loss of the use of the barge for the period of delay; not the value of the staves, the proximate cause of the loss of these having been the high water.<sup>3</sup>

(j) A message directs the person to whom it is addressed to make a purchase of oil if he thinks it safe; it is found as a fact that if the despatch had been received in time, he would have purchased at \$1.17 per barrel. The next day the price rises to \$1.35, and no purchase is ever made. There is no proof that had the oil been purchased it would have been resold. The plaintiff can only recover the cost of sending the despatch.<sup>4</sup>

(k) B. sends a message to his agent at R. requesting him to telegraph back information as to the condition of an oil well at R. belonging to B.; owing to defendant's fault the message does not reach the agent for some days, and B. sells the property for less than, in view of the actual facts as to its condition, it was worth. The defendant had no notice or knowledge of B.'s object in sending the despatch. The only loss for which he can recover is the money paid for its transmission.<sup>5</sup>

(l) The action is by the sender against the telegraph company to recover damages for a mistake in the transmission of a de-

<sup>1</sup> Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575.

<sup>2</sup> Western U. T. Co. v. Crall, 38 Kan. 679; 5 Am. St. Rep. 795.

<sup>3</sup> Bodkin v. Western U. T. Co., 31 Fed. R. 134.

<sup>4</sup> Western U. T. Co. v. Hall, 124 U. S. 444. There is no proof of loss. He would have had the oil, but he would have paid its exact market value. The only way of making out a loss is to assume that he would have sold the next day, which is mere conjecture.

<sup>5</sup> Baldwin v. United States T. Co., 45 N. Y. 744.

spatch, which was in cipher, unintelligible except to the sender and his agent. No more can be recovered than the sum paid for sending the message.<sup>1</sup>

(m) A message is sent to R. informing him of the death of his brother, and the time and place of burial, but through negligence it is not delivered. Had he received it, he would have been present at the funeral. The damages claimed are for disappointment and mental suffering through having been prevented. The court instructs the jury that such damages may be recovered, and a verdict is rendered for \$800. The verdict cannot be sustained.<sup>2</sup>

(n) Messages are sent to a woman, announcing the illness and death of her brother. The damages claimed are for being prevented from caring for her brother, and making preparations for his funeral. A demurrer cannot be sustained; the plaintiff has a right of action for nominal damages, and she may also recover for mental suffering.<sup>3</sup>

(o) H. telegraphs his physician, at a distance of five miles by rail, "Come first train to see my wife, very low." The message is not delivered till the next day, when the physician at once goes to H.'s house; six hours later H.'s wife dies. The physician testifies that had he received the despatch the day before he would have gone at once, but is not certain that he would have been able to save his patient's life. On suit by H. damages may be recovered for mental suffering.<sup>4</sup>

<sup>1</sup> *Primrose v. Western U. T. Co.*, 154 U. S. 1.

<sup>2</sup> *Western U. T. Co. v. Rogers*, 68 Miss. 748.

<sup>3</sup> *Wadsworth v. Western U. T. Co.*, 86 Tenn. 695. Provided, of course, that there are not circumstances showing that she did not suffer. Near relatives may be on such terms as to preclude the possibility of such proof.

<sup>4</sup> *Western U. T. Co. v. Henderson*, 89 Ala. 510; in such a case mental suffering would seem to be imported.

## CHAPTER XXI.

### BREACH OF PROMISE.

THE rules governing in actions for breach of promise of marriage illustrate many points with regard to the law of damages. The action is in form one of contract, but the injury falls partly on person and partly on property, while the direct and natural consequence of the breach is the very species of injury which the law in ordinary actions of contract refuses to redress, — mental suffering, injury to feelings and affections, and wounded pride. Substance has here, as elsewhere, prevailed over form, and the result is that the action more resembles an action of tort than one of contract.

The action is peculiar in another respect. It might be supposed that since what the plaintiff has lost is a marriage, and since she is entitled to pecuniary compensation for this, what she would recover would be the difference between her position as a single woman, and the sum of the benefits she would have received from the marriage. But no such rule can be applied, because there is no saying with certainty what would have been the benefits of a particular marriage. The whole matter is conjecture.<sup>1</sup>

<sup>1</sup> It may be worth suggesting that this lack of certainty as to proof may have been one reason why the common law allowed no action for the death of a human being. The benefit to be derived by a family from the continuation of the life of a member is as problematical as the possible benefit to be derived from a marriage. We are so accustomed to the statutory action for death, with its rule as to "probable benefit," that we are apt to forget the inherent difficulties which beset estimates of this description. It should not be overlooked that,

The jury are allowed to hear evidence as to the circumstances of the defendant, and to consider them in giving a verdict; but this does not mean that the plaintiff recovers the value of the lost marriage, as in the case of an ordinary commercial contract.

In a recent English case in the Court of Appeal, the nature of the action for breach of promise has been carefully considered. The question was whether such an action, where no special damage is alleged, survives against the personal representatives of the promisor. It was held that it does not; that the special damage which would cause it to survive must be damage to the property and not to the person of the promisee, and must be within the contemplation of both parties at the date of the promise, and that the action can be brought against the executors for such special damage only, and not for general damages.<sup>1</sup> The theory upon which the decision is based is made entirely plain in the opinions of Lord Esher, M. R., and Bowen, L. J. It is that, though formally an action of contract, the action for breach of promise of marriage is founded upon an injury resembling deceit or fraud, as in tort; that the claim for the loss of the marriage is merely secondary; in other words, that the substantive *cause of action* is purely for elements of injury affecting the person, and that when the pecuniary circumstances of the defendant are gone into, this is merely one of the collateral circumstances of aggravation. This makes the action on one side one of deceit or fraud, on the other, of contract, and explains what is said about special damage. It is not particular injury which is meant, but special or consequential damages, under the rule in *Hadley v. Baxendale*. Although the cause of action considered as a personal wrong does

owing to the fact of the existence of the jury, many things are rigidly excluded in a common-law court which might under a different system be admitted.

<sup>1</sup> *Finlay v. Chirney*, 20 Q. B. D. 494.

not survive, there is a *promise*, and if the plaintiff can show that the breach of this promise produced "a temporal (i. e., pecuniary) loss flowing directly from the breach or within the contemplation of both parties," a recovery may be had against the executor of the promisor.

The case does not make it clear what such special damages must be. Bowen, L. J., says that neither the expense of maintaining herself as a feme sole after the breach, nor money spent for a trousseau by the plaintiff, is enough ; but he expressly says that it is not to be understood that there may not be a claim for a trousseau which would be held good. Perhaps if a date were fixed for the marriage, and the plaintiff purchased her trousseau on the strength of it, this might be held a ground of recovery against the executor. The American decisions support the view taken by the English court,<sup>1</sup> and the result arrived at seems, from a technical point of view, quite as anomalous as everything else connected with this action. An action formally in contract, which does not survive so far as the substantive cause of action is concerned, and yet which may survive by means of the formal cause of action for the purpose of securing compensation for a radically different form of injury, is, to say the least, *sui generis*. There is something of the same sort in seduction, when the formal cause of action is loss of service, and the substantive cause of action the wrong and injury.

It has been seen that general damages are such as are naturally imported by the statement of the cause of action. The law is said to imply them, or presume them to have accrued from the wrong complained of.<sup>2</sup> As a rule the law merely follows common experience, and implies such damages as the statement of the cause of action logically

<sup>1</sup> Stebbins v. Palmer, 1 Pick. 71 ; Smith v. Sherman, 4 Cush. 408 ; Hovey v. Page, 55 Me. 142 ; Lattimore v. Simmons, 13 S. & R. 183.

<sup>2</sup> 1 Chitty Pl. 395.

imports; special damages, on the other hand, are such as are asserted to have followed from the cause of action, but are not imported by it. Such damages can never be recovered, unless they are (1) specially set up in the declaration, and (2) proved to be a proximate consequence of the wrong complained of.

In an action for breach of promise, general damages only are claimed,<sup>1</sup> but the plaintiff is allowed to prove seduction and the birth of a child. This is a good ground for a new trial. Had she alleged that owing to the condition she was in her mental suffering had been aggravated, this would have been a proximate result, and she might have proved it; but it is not necessarily imported in the statement of the cause of action. But proof of the effect upon her bodily health of the seduction would be inadmissible, even if averred.<sup>2</sup> The reason given is that the plaintiff was, in part at least, responsible for the seduction, and cannot recover for this wrong, or its consequences. Mutual fault is no doubt the explanation of the common-law rule that no action lies for seduction.<sup>3</sup> In some jurisdictions the common-law rule is not recognized, and a woman may maintain an action for her own seduction; but then she must prove that her will was overborne by that of the defendant (*e. g.*, owing to the peculiar relation in which she stood to him, as adopted daughter, etc.), in other words, that she was not a consenting party.<sup>4</sup> In the action for breach of promise, she may recover for mental suffering which the defendant must have known would be enhanced owing to her condition; but of course the seduction itself is not a consequence of the breach.

<sup>1</sup> There was an averment in the declaration of disappointment and mental suffering, but the court held these to be general damages, implied in every case.

<sup>2</sup> *Tyler v. Salley*, 82 Me. 128.

<sup>3</sup> *Paul v. Frazier*, 3 Mass. 71.

<sup>4</sup> *Watson v. Watson*, 53 Mich. 168.

## RULES.

100. *In actions for breach of promise of marriage, the amount of the verdict is in the discretion of the jury.*
101. *All circumstances in aggravation or mitigation are admissible in evidence.*
102. *Exemplary damages may be given.*
103. *Verdicts may be set aside as excessive or inadequate.*

## ILLUSTRATIONS.

(a) The jury are instructed that they may consider the following elements of damages: (1) disappointment of plaintiff's reasonable expectations, and the loss caused thereby, and among other things the money value of the marriage. (2) The injury to her affections. (3) Mortification and distress, resulting from defendant's refusal to fulfil his promise, and in connection with the last two elements of injury, the length of time during which the engagement has existed, her wounded spirit, the disgrace and insult to her feelings, and probable solitude which would result from the desertion. The instruction is proper.<sup>1</sup>

(b) On the trial the jury is charged that if they find for the plaintiff they "should award her such damages as will place her in as good a condition pecuniarily as she would have been if the contract had been fulfilled." The instruction is improper; it is too complicated and conjectural to be of service, and should not have been given.<sup>2</sup>

(c) The verdict is for £2500. The defendant is a man of considerable property, the plaintiff, of a respectable family, has been seduced by him under promise of marriage and cast off. The amount is not excessive, it is a matter of discretion with the jury.<sup>3</sup>

<sup>1</sup> Coolidge v. Neat, 129 Mass. 146.

<sup>2</sup> Miller v. Rosier, 31 Mich. 475. In Lawrence v. Cooke, 56 Me. 187, such a direction was held proper; but, as explained above, the Michigan decision would seem to be in accordance with principle.

<sup>3</sup> Berry v. Da Costa, L. R., 1 C. P. 331.

(d) The defendant sets up as a reason for the breach that the plaintiff is unchaste. The charge being entirely contradicted by the evidence, this aggravates the injury, and the jury may give exemplary damages.<sup>1</sup>

(e) The jury is instructed that an attempt to prove the plaintiff guilty of misconduct with other men of which he knew she was not guilty is matter of aggravation, although not set up in the answer. This is not ground for a new trial.<sup>2</sup>

(f) Proof of seduction or of seduction followed by the birth of a child is admissible in aggravation.<sup>3</sup>

(g) The plaintiff may give evidence of the financial resources and social position of the defendant. Both are relevant to the question: what sort of a home was held out to her as an inducement?<sup>4</sup>

(h) The trial judge is requested but refuses to charge the jury that they should take into consideration the character and habits of the plaintiff, and if they believe, from the evidence, that she was addicted to lewdness and profanity, or either, they should consider these circumstances in mitigation. The refusal is error for which the judgment must be reversed.<sup>5</sup>

(i) Defendant, denying the promise, testifies that he withdrew because he did not like the plaintiff well enough to marry her, and his counsel argues to the jury that they ought to consider that the plaintiff's loss is less by reason of her having escaped an unhappy marriage. The point is not properly raised by the exceptions; but the court says that if it had been, the matter would not be one of mitigation; because the defendant might have inflicted a greater injury by keeping his promise, is no reason why the plaintiff should not recover the damage actually sustained.<sup>6</sup>

<sup>1</sup> Southard v. Rexford, 6 Cowen, 254.

<sup>2</sup> Kniffen v. McConnell, 30 N. Y. 285, 293.

<sup>3</sup> Sherman v. Rawson, 102 Mass. 395; Kelley v. Riley, 106 id. 339; Coil v. Wallace, 24 N. J. L. 291.

<sup>4</sup> Bennett v. Beam, 42 Mich. 346; Berry v. Da Costa, L. R., 1 C. P. 331.

<sup>5</sup> Burnett v. Simpkins, 24 Ill. 264.

<sup>6</sup> Piper v. Kingsbury, 48 Vt. 480. Another reason would be that a promise to marry usually contemplates love and affection. If the de-

(j) The suit for breach of promise is brought against the woman, and the evidence is that the plaintiff is a man of gross manners, and destitute of feeling; that he has conducted himself with brutality and violence, and threatened to treat defendant ill. He asks for damages for the loss of the society of a person whom he never seems to have valued, and the jury should take this into account: his damages for injury to his affections cannot be great.<sup>1</sup>

(k) Statements made by plaintiff a few days after the engagement was broken, that she cared nothing for defendant; that all she wanted was his money, and to spite his family; and that she did not mean to live with him, are admissible in mitigation. They show a less amount of injury.<sup>2</sup>

(l) The defendant may give in evidence, in mitigation of damages, the fact that he refuses to go on with the marriage because of the settled opposition of his mother, who is in infirm health.<sup>3</sup>

defendant were to notify the plaintiff at the time of the engagement that he did not care for her, it might then, on breach, become a question whether he could be held for a head of damage which both parties did not contemplate. This, however, might not be of much practical importance, as the main heads of damage, the effect upon the plaintiff's mind and affections and the loss of the marriage, might not be diminished. When the want of love and affection is on the plaintiff's side the case is different. See the next two illustrations.

<sup>1</sup> Leeds v. Cook, 4 Esp. 256.

<sup>2</sup> Miller v. Rosier, 31 Mich. 475.

<sup>3</sup> Johnson v. Jenkins, 24 N. Y. 252.

## CHAPTER XXII.

### CONTRACTS AFFECTING REAL ESTATE.

WITH reference to covenants or agreements affecting real estate an important distinction must be noticed. As a general rule there is no difference between the principles governing damages in contracts affecting real estate and any others. The rules of avoidable consequences, of *Hadley v. Baxendale*, that the compensation must equal the injury, apply as much to real estate as to anything else.

With regard to covenants in leases, for instance, little need be said except that they are treated as ordinary commercial contracts, and the plaintiff recovers his actual loss, which varies with the precise terms of the covenant and the circumstances of the case. The covenant is to give possession, and the tenant on failure fails to obtain it; his measure of damages is evidently the value of the lease that he was to have had. In other words, for failure to give a tenant possession, his measure of damages against his landlord is the difference between the rent reserved and the value of the premises during the term.<sup>1</sup> This is only an instance of the application of the rule that for breach of contract the measure of damages is the net value of the contract. But, owing to the peculiar nature of the contract, it continually happens that other damages are claimed. The tenant may have been compelled to obtain lodgings elsewhere; for this expense he may recover.<sup>2</sup> Still, the normal rule of damages always remains the same.

<sup>1</sup> *Trull v. Granger*, 8 N. Y. 115.

<sup>2</sup> Cf. *Yeager v. Weaver*, 64 Pa. St. 425, and *Eddy v. Coffin*, 149 Mass. 463.

## RULE.

104. *For failure to give possession by landlord, the measure of damages is the difference between the rent reserved and the value of the premises for the term.*

On breach of a covenant to repair, the tenant will always recover his actual loss, but it can hardly be said that there is an abstract rule for determining it. Usually he may make the repairs himself and recover the expense. Or, the want of repairs may make the premises uninhabitable; then he would recover the rental value during the period of the breach.<sup>1</sup> Where the action is against the tenant, the measure of damages varies in the same way with the circumstances. He vacates the premises at the end of the term, leaving them out of repair; the measure of damages is the cost of the repairs.<sup>2</sup> On the other hand, if the term still continues and the landlord cannot repair, the measure of damages may be the diminution in the value of the reversion.<sup>3</sup>

It is needless to multiply illustrations of this sort. What has been said about leases may be said of the whole array of contracts relating to real estate. In every case the precise nature of the interest affected (whether a term of years, a reversion, a life estate, a remainder, etc.), the character of the contract and the extent and elements of the injury must be inquired into. Analogies with cases affecting personal property will frequently present themselves, but they do not signify that the rule in one case is the rule in the other. A railroad company covenants, for instance, in consideration

<sup>1</sup> *Hexter v. Knox*, 63 N. Y. 561.

<sup>2</sup> *Clow v. Brogden*, 2 M. & G. 39; *Watriss v. Cambridge Nat. Bank*, 130 Mass. 343.

<sup>3</sup> *Smith v. Peat*, 9 Ex. 161; *Mills v. East London Union*, L. R., 8 C. P. 79; *Middlekauff v. Smith*, 1 Md. 329.

of the right of way through A.'s land, to erect a station, and permit him to cultivate all the land comprised in the grant which is not needed by the railroad. On a breach of this covenant, the measure of damages is the difference between the value of the lands as they are, and the increased value they would have had if the covenants had been performed.<sup>1</sup> This recalls the case of warranty of a chattel; but, as will be presently seen, an actual warranty in the case of real estate is governed by rules not resembling those applicable to warranties of chattels.

The great apparent exception to the rule that contracts relating to real estate are governed by the same principles which prevail elsewhere is found in the ordinary covenants contained in deeds; here one at least of the exceptional rules is sanctioned by experience and authority; while the other has come down to us from times when the general principles of the law of damages, and especially of value, had not been developed.

The ordinary covenants in a deed of land are (1) that of seisin; (2) that of right to convey (these two covenants are synonymous and mean that, at the time of the conveyance, the grantor has title; if he has not, they are broken at once); (3) that of warranty; (4) that of quiet enjoyment (these relate solely to the future, and bind the grantor and his heirs indefinitely to make the covenant good); (5) the covenant against encumbrances.

The exceptional rules relate to all these covenants, and their basis is the principle, that wherever there has been a breach, the consideration of the deed, and not the real value of the lands at the time of the eviction, shall fix the damages. The cases which arise are, under the first two covenants, lack of title, partial or total, at the time of the conveyance; under the others, either eviction from whole or part of the land, or the establishment of the fact at

<sup>1</sup> *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422.

some later date, that an encumbrance or superior title exists (which also may result in eviction). On general principles the measure of the damages would be fixed by the value of the bargain, — *e. g.*, in case of a total eviction, the value of the property lost, with interest for such a period as the covenantee may be liable for mesne profits, to the person holding the superior title. The value would be taken, in the case of the covenant of seisin at the time of the conveyance, for it is then that the breach occurs; in other cases, the value would be taken at the time of actual eviction. In neither class of cases is this the actual rule.<sup>1</sup>

### RULES.

105. *For breach of the covenant of seisin the measure of damages is the consideration paid with interest; <sup>2</sup> in the case of partial eviction, a proportional part of the consideration.*
106. *For breach of the covenant of warranty or quiet enjoyment, the measure of damages is the consideration, or a proportional part of it, with interest during the period for which there is a legal claim against the vendee for mesne profits, together with the expenses of the eviction suit.<sup>2</sup>*

<sup>1</sup> The rules given in the text are believed to be those generally in force. In some States, the measure of damages is made to depend upon the value at the time of the breach, as in the case of any other contract. In Massachusetts, on a covenant of warranty, the measure of damages is the value of the estate at the time of eviction together with the value of the improvements. *Cecconi v. Rodden*, 147 Mass. 164; the leading case in Massachusetts is *Gore v. Brazier*, 3 Mass. 523, 543.

<sup>2</sup> The cases given as illustrations will frequently be found to allow damages due to other elements of injury. The rules only state the normal measure.

ILLUSTRATIONS.

(a) The action is for breach of covenants of seisin and quiet enjoyment. The vendee cannot recover for improvements, nor for increased value.<sup>1</sup>

(b) The covenants broken, embracing the covenant of seisin are held to give no greater rights than that covenant. For breach of this, through an ejectment suit brought by the real owner, the vendee's measure of damages is the consideration in the deed, with interest, for the same period of time as is covered by any legal claim against him (by the holder of the superior title) for mesne profits; together with the costs and reasonable counsel fees in the ejectment suit, for this suit the warrantor was bound to defend. There can be no recovery for the costs in the suit for mesne profits; the warrantor was not bound to defend it.<sup>2</sup>

(c) In an action for breach of the covenant of seisin, it appears that the defendant had no title at the time of conveyance; the measure of damages is the consideration with interest.<sup>3</sup>

(d) The covenant broken is that of seisin, the failure of title and eviction being partial. The measure of damages is a sum which bears to the total consideration the same proportion

<sup>1</sup> *Pitcher v. Livingston*, 4 Johns. 1. The vendee is often allowed for improvements in the eviction suit, to the extent of the value of the rents and profits. This seems to have been so, even in the ancient real actions. *Viner's Abr. tit. Discount.*

<sup>2</sup> *Staats v. Ten Eyck's Exrs.*, 3 Caines, 111. The opinion is by Kent, C. J. See Ch. III. p. 38, *ante*. When it is said that the warrantor is bound to defend, it is not meant that he is bound to come in as a party defendant. The plaintiff may notify the warrantor to come in, but cannot compel him to do so. If he does not, the covenantee may defend himself, and still recover from the warrantor. The difference between the two cases is solely in the force and effect of the two judgments. In the first, the judgment becomes competent evidence in the subsequent proceedings upon the warranty. In the second, it is not evidence at all; the grantee must prove all the facts which (had the warrantor defended and been defeated) would have been proved for him. *Boyle v. Edwards*, 114 Mass. 373.

<sup>3</sup> *Montgomery v. Reed*, 69 Me. 510.

which the value of the tract lost bears to the value of the whole tract.<sup>1</sup>

(e) W. covenants that he is seised and has good right to convey; but his deed only conveys a title to a fractional undivided interest. The measure of damages is the proportion of the purchase-money which the interest not conveyed bears to the portion to which the title has passed.<sup>2</sup>

(f) A tenant in common conveys common property with a covenant of seisin; the deed is inoperative against his co-tenants, but the co-tenants confirm the grant. There has been a breach of the covenant, but no actual damage. The plaintiff can only recover nominal damages.<sup>3</sup>

(g) L. conveys to M. with full covenants of warranty and seisin land to which he has no title, and this is held to be a constructive eviction; subsequently the grantor obtains a good title to all but a part of the land, which enures to the benefit of the grantee. By direction of persons who meantime hold the superior title, timber is cut and taken away. The measure of damages is: 1. the value of this timber; 2. such proportion of the whole purchase-money as the value of the part to which the title has failed bears to the whole value.<sup>4</sup>

The covenant against encumbrances is broken at once, at the time of the conveyance, if any encumbrance exists. But there may be no damage from it beyond what the law implies in any such case. Substantial damage may accrue in a variety of ways. The encumbrance may be such that in order that the conveyance should be of any benefit to the grantee it should be at once extinguished. A common case is that of a mortgage subject to immediate foreclosure. Or, the encumbrance may, as in the case of

<sup>1</sup> *Bibb v. Freeman*, 59 Ala. 612.

<sup>2</sup> *Tone v. Wilson*, 81 Ill. 529.

<sup>3</sup> *Hartford & Salisbury Ore Co., v. Miller*, 41 Conn. 112. This is a good illustration of a benefit accepted by the person injured, and actually reducing the damages to nothing. See Chapter on Limitations of Injury.

<sup>4</sup> *McInnis v. Lyman*, 62 Wis. 191.

a right of way, or other easement, diminish the value of the estate, permanently, if it cannot be removed, temporarily, if it can be extinguished. Finally, the encumbrance may be of such a character as to result in the actual eviction of the grantee. In all these cases, the measure of damages must be the total amount of injury, but whenever the consideration is resorted to to limit the loss, the result will be different from what it will be in those jurisdictions in which the actual value is taken; and this will be only in cases of eviction, total or partial. In all other cases, as when the covenantee himself extinguishes the encumbrance (*e. g.*, by paying off a mortgage)<sup>1</sup> or when the encumbrance is permanent, and the value of the property is by so much diminished the actual loss measures the damages. A partial failure of title presents practically the same case. The only way in which a general rule can be stated would perhaps be: —

#### RULES.

107. *For breach of the covenant against encumbrances, when there has been a total eviction, the measure of damage is the consideration. For partial eviction, the measure of damages is a proportional part of the consideration.*
108. *For a permanent encumbrance the measure of damages is the difference in value not exceeding the consideration of what purports to be and what is conveyed.*
109. *For an encumbrance removable at reasonable expense, the measure of damages is the cost of removing it.*
110. *The covenantee is not restricted to the nominal consideration. He may prove the actual price paid.*

<sup>1</sup> Under the rule of avoidable consequences.

## ILLUSTRATIONS.

(a) The covenantee is evicted by reason of an antecedent mortgage. The measure of damages is the amount of the consideration money with interest.<sup>1</sup>

(b) Suit is brought on the covenant against encumbrances; the covenantee bought the land for \$250, and has put on improvements worth \$2000. The encumbrance is a judgment on an undivided moiety, under which encumbrance one half is sold. The measure of damages is \$125.<sup>2</sup>

(c) The encumbrance is a permanent right of way. It is found that the damage to the time of suit is \$10, but that the property is worth \$750 less than if it had been free from the encumbrance. The measure of damages is \$750.<sup>3</sup>

(d) The encumbrance is permanent. The plaintiff is entitled to recover a just compensation for the real injury resulting from its continuance.<sup>4</sup>

(e) The permanent title consists of a mortgage, the amount of the debt secured by it being less than the value of the land. The mortgagee sues and obtains a conditional judgment; the vendee may now discharge the encumbrance and obtain a clear title. His measure of damages against his covenantor is the

<sup>1</sup> *Stewart v. Drake*, 9 N. J. L. 139.

<sup>2</sup> *Dimmick v. Lockwood*, 10 Wend. 142, 154.

<sup>3</sup> *Mitchell v. Stanley*, 44 Conn. 312.

<sup>4</sup> *Harlow v. Thomas*, 15 Pick. 66; in the rule above it is stated to be the difference between the value with and without the encumbrance. The Massachusetts cases seem to avoid putting this rule in form; but as a permanent encumbrance must diminish the value by the real injury resulting, the rule would seem to be a fair inference. Cf. *Batchelder v. Sturgis*, 3 Cush. 201. In this case the court excluded opinions of witnesses as to the probable value of the estate (the encumbrance was a lease) on a resale. This was said to be objectionable, as matter of conjecture, or because the purpose to resell was not within the contemplation of the parties; but the Court says expressly, "One of the modes in which the damages may be assessed is the *annual value*." But to take the annual value, or value of the use, or rent, is only one way of getting at what the land is actually worth.

amount of mortgage debt with interest, and cost of the mortgagee's suit.<sup>1</sup>

(f) The vendee has not paid off the encumbrance, but has remained in peaceable possession, and there is a mere possibility that a claim under it may be made. In such an event the probability is that by a complaint in equity the covenantor may compel third parties to pay the claim. Under these circumstances the covenantee has no claim for substantial damages.<sup>2</sup>

(g) The encumbrance is a mortgage, but the covenantee has paid nothing toward removing it. He can recover nothing for breach of the covenant.<sup>3</sup>

(h) The encumbrance is an inchoate right of dower in a part of the estate. The only evidence of substantial damage is that the covenantee had paid an auctioneer \$50 for selling the estate at auction, and that the purchaser had refused to complete the purchase on learning of this defect. A verdict for \$50 cannot be sustained; the plaintiff has not been disturbed in the enjoyment of his estate, and has paid nothing to extinguish it. Under the circumstances, his only damage must be the direct injury resulting from the encumbrance. The damages claimed are remote.<sup>4</sup>

(i) A. for the sum of £10 conveys to B. an interest in lands with covenants for quiet enjoyment and warranty as regards himself, and those claiming through him. B. is evicted. The actual value is agreed by the parties to be £500. The measure of damages is £500.<sup>5</sup>

(j) The consideration named in a deed is \$2000. The actual consideration is shown to have been two lots valued at \$500, and a note for \$1000. In an action for breach of warranty, as between grantor and grantee, the measure of damages is \$500 with interest, and the value of the note.<sup>6</sup>

<sup>1</sup> Donahoe v. Emery, 9 Met. 63; cf. Tufts v. Adams, 8 Pick. 547.

<sup>2</sup> Grant v. Tallman, 20 N. Y. 191.

<sup>3</sup> Tufts v. Adams, 8 Pick. 547.

<sup>4</sup> Harrington v. Murphy, 109 Mass. 299; cf. Bradshaw v. Crosby, 151 Mass. 237.

<sup>5</sup> Jenkins v. Jones, 9 Q. B. D. 128.

<sup>6</sup> Howell v. Moores, 127 Ill. 67, 86; acc.: Cook v. Curtis, 68 Mich. 611.

(k) The action is for breach of the covenant of seizin. The rule is the same.<sup>1</sup>

(l) The land is paid for in stock of a corporation at a fictitious value. The actual value of the stock (the real consideration) is the measure of damages.<sup>2</sup>

Covenants to remove existing encumbrances, or to pay all claims against the land sold, or to save the covenantee harmless from any claims, are totally different from the ordinary covenant against encumbrances. They are either agreements for an indemnity, in which case no claim arises until something has been paid; or they are agreements to pay in any event, in which case the mere non-payment by the covenantor of the existing claim constitutes a breach.<sup>3</sup>

The foregoing rules, so far as they substitute consideration for value, cannot be defended upon principle. It is sometimes said that in case of a deed, the consideration is solemnly agreed upon as the value of the bargain; but, as has been shown, the nominal consideration does not govern; and again, the same thing might be as well said of the consideration in any other contract. Throughout the whole range of contract consideration is price, the value of the bargain is a totally different matter. The object of compensation is to put the plaintiff in the position in which he would have been had the contract been performed. The effect of letting him recover only the consideration of a contract is to put him in the same position as if he had not made the contract. The principle of fixing the limit of recovery in the case of eviction *at the time*, not of the breach, but of the conveyance, rests on other considerations. A warranty at common law was

<sup>1</sup> Bingham v. Weiderwax, 1 Comst. 509.

<sup>2</sup> McGuffey v. Humes, 85 Tenn. 26.

<sup>3</sup> See Chapter XVIII.

made good by a delivery of *lands of equal value* with those to which the title had failed. The money covenant is a substitute for this. There is no evidence to be found that in the Middle Ages the warranty meant other lands equal in value to those which had been lost, however much increased by improvement or accident; it may, therefore, be said that the covenant which is the substitute for the old warranty can hardly mean more than that did. Again the agreement is really to defend the title to the lands *as conveyed*, — to make good the title, and the fact that the covenant runs on indefinitely does not make the contract one to indemnify for a totally different loss. Finally, it is said: Who would be willing to be bound indefinitely, for a consideration fixed by present value, to pay for lands which may, by the pressure of population and business, be converted from a waste into property of enormous value? It is such considerations as these which have generally led to the conclusion that the value at the time of eviction cannot govern.<sup>1</sup>

---

SALES. — The rules of damages with regard to real estate contracts may be said in general to be in harmony with those governing elsewhere, except where the peculiarities of real property make it impossible. Sales of real estate furnish an illustration of this. In the case of a breach by vendee, the rule is practically the same as in the case of chattels, — that the vendor recovers nominal damages, unless the land has declined in value, when he recovers the difference between the contract price and the value of the land left on his hands.<sup>2</sup> The idea, fostered

<sup>1</sup> For a full consideration of the subject, see Rawle on Covenants for Title, ch. ix.

<sup>2</sup> *Shannon v. Comstock*, 21 Wend. 457; *Laird v. Pim*, 7 M. & W. 474. For a good discussion of this subject, see *Congregation Beth Elohim v. Central Presb. Church*, 10 Abb. Pr. (N. S.) 484.

by a *dictum* in a New York case<sup>1</sup> that a vendor can, by the tender of a deed, put himself in the position of having completely performed, and recover the price agreed upon, and then keep the land, is supported neither by principle, nor by direct authority. His tender gives him the right to an action; but the measure of damages is another question. It would be strange indeed if here so singular a principle should exist, of which the law of sales of personal property shows no trace. "The vendor cannot have the land and its value too."<sup>2</sup> On the whole, there may be said to be no difference in the rule as to damages against the vendee between personal and real property.

When, however, we come to damages against the vendor, the facts are wholly different. Here, in the case of personal property, the purchaser recovers the value of his bargain. But in the case of real estate sales, in England, the rule is that the plaintiff recovers, not the value of his bargain, but merely any deposit paid down to bind the bargain, with interest and costs.<sup>3</sup> The reason for this rule is that whereas, in the case of personal property, every one is supposed to know his title, real estate titles in England are matters of peculiar intricacy, involving considerations of fact as well as of law, and a possessor may be in total ignorance whether his title is bad or good, until an examination has been made. The fact that titles in England are not generally recorded gives this reason more force. In this country, in some States, the rule has been adopted;<sup>4</sup> but it might be supposed that in a country in which all titles are matters of record the rule would soon lose its force; and the Supreme Court of the United States early laid it down that

<sup>1</sup> *Richards v. Edick*, 17 Barb. 260.

<sup>2</sup> *Per Parke, B.*, in *Laird v. Pim*, *supra*.

<sup>3</sup> *Flureau v. Thornhill*, 2 Wm. BL 1078; *Bain v. Fothergill*, L. R. 6 Ex. 59; L. R. 7 H. L. 158.

<sup>4</sup> *Margraf v. Muir*, 57 N. Y. 155; *Burk v. Serrill*, 80 Pa. St. 413.

it recognized no difference between real and personal property,<sup>1</sup> and this may be said to be the prevailing rule in the United States.<sup>2</sup> It will be noticed this is one of the few cases in which a rule in contract is based on the defendant's state of mind, — his *bona fide* ignorance as to his title. Consequently, even in those jurisdictions where the rule in *Flureau v. Thornhill* is law, an inquiry is always permissible as to good faith and knowledge. If the vendor can convey, but will not; or if, when he agreed to convey, he knew that he would not be able to do so, he is everywhere held liable for the value of his bargain.<sup>3</sup> It is practically impossible to state rules of general application on this subject.

<sup>1</sup> *Hopkins v. Lee*, 6 Wheat. 109.

<sup>2</sup> See the cases collected, 3 Sedg. Dam. (8th ed.) 197.

<sup>3</sup> *Margraf v. Muir*, 57 N. Y. 155.



## APPENDIX.

---

### AN EARLY ENGLISH CASE INVOLVING DAMAGES.<sup>1</sup>

Henry de Bodreugam complained by bill, that Thomas le Arcedekne tortiously and against the peace of our lord the King, came with force and arms at a certain day, year, and place, and assailed, beat, and wounded him, and his goods, &c. ; and that tortiously and against the peace he took away William, son and heir of B., who was in his wardship, and to his damage, &c. — *Middleton* denied the tort and force, and as to its being against the peace of our lord the King, and the coming, &c. ; and said that Thomas did nothing against the peace. So a jury was summoned. THE INQUEST said that Sir Ralph de Bloyon, on the same day as that complained of by Henry le Bodreugam, came to the inn of Thomas le Arcedekne, and there they had a long conversation ; and afterwards Sir Ralph and Thomas and their followers went to the house of William Beyon, where Sir Henry was. Sir Rauf entered, together with all the others, except Thomas, who did not enter, and requested Henry that he would deliver up to them an infant who was in ward to him ; but Henry would not do so. Strife arose between them, and Henry was beaten and wounded, as he complains of having been. — BRUMP-

<sup>1</sup> The names of judges are indicated by capitals ; those of counsel by italics.

TON. What right had Sir Henry to the wardship? — THE INQUEST. None, save the wardship of the infant by virtue of his mother having delivered him (to Henry) in consequence of a disagreement between Sir Ralph and the mother. — BRUMPTON. After the fact, where did they go? — THE INQUEST. To the house of Thomas, and there the infant remained full three days afterwards. — *Middleton*. Sir, bear in mind that Sir Thomas did not beat or wound, as stated in the plaint. — SPIGONEL. If three thieves come to a man's house, and one forces and enters the house, and the other two stand outside in the meantime, they shall all three be taken and convicted of this, whatever judgment you may think will be passed on the two. — *Middleton*. It is different in case of burglary or appeal of death of a man, from what it would be in trespass. — BRUMPTON. Go on now to the damages, and tell us if they carried away any goods or armour, &c. — THE INQUEST. They did not carry away any chattels, but we assess his damages at one hundred marks. — *Middleton*. Sir, there are others who committed the trespass, and against whom the plaintiff can recover; we entreat you to take this into consideration. — BRUMPTON. Know that none of the others shall ever take exception by reason of this judgment, for he has his action against each one, and each one is liable to the whole, and he shall recover his damages against each one severally, if he choose to sue him;<sup>1</sup> and forasmuch as he is convicted of having gone armed in company with Sir Ralph, and his followers entered the house as before-mentioned, thereby it well appears that he was an assenting party to what took place, and we consider him altogether as a principal, and the Court adjudges that Henry do recover his damages, which are assessed at a hundred marks, and that Sir Thomas do go to prison. — *Middleton*. Sir Thomas

<sup>1</sup> The rule is the same to-day, *ante*, p. 144.

prays mainpernors.<sup>1</sup> — BERREWIK. You may agree with the party, and as to what concerns the king we will show such favour as the law allows.<sup>2</sup> — In the course of this case BRUMPTON said, that a buffet given to a knight or noble was as bad as a wound given to one of the rabble. — On another day Sir Thomas was brought from prison, and he prayed mainpernors. — BERREWIK. Have you arranged with the plaintiff? — *Thomas*. No, Sir. — Then Sir Henry and Thomas went out; and Henry gave Thomas a respite of a fortnight, provided that he should in the mesne time abide by the judgment, and remain under the jurisdiction of the justices. — BERREWIK. Know, that if by your consent he be once let out of prison, we shall never send him back again by virtue of this our present judgment; but as to the recovery of damages, which is given by statute,<sup>3</sup> if he remain continuously in custody, you shall have execution whenever you please.<sup>4</sup>

<sup>1</sup> Sureties or bail.

<sup>2</sup> This brings out clearly the distinction between the civil and the criminal side of the case.

<sup>3</sup> This probably means that the right to execution is statutory.

<sup>4</sup> Year Book, 30 & 31 Edw. I. p. 106 (A. D. 1302).



# INDEX.

---

	Page
ACT, responsibility for . . . . .	52
AGENCY . . . . .	271
intervening . . . . .	54
tort and contract in . . . . .	271
alternative rule in . . . . .	272
AGENT,	
independent . . . . .	54
suit by, against principal . . . . .	272
AGGRAVATION . . . . .	144
AGREEMENT, possession gives right to make and en- force . . . . .	264
ALTERNATIVE CONTRACTS . . . . .	233
ARRANGEMENT, order of . . . . .	11
ASSAULT . . . . .	150
ASSUMPTIONS, fundamental legal . . . . .	47
AVOIDABLE CONSEQUENCES . . . . .	33
are remote . . . . .	74, 77
expense of avoiding . . . . .	75
in contracts of hiring . . . . .	76
question for the jury . . . . .	77
 BENEFITS . . . . .	 116, 203
BOND,	
condition of . . . . .	216
penal . . . . .	216
BONDS, containing covenants . . . . .	218
BREACH OF PROMISE, mental suffering in . . . .	305
 CARGO, insurance on . . . . .	 267
CARRIER, said to be an insurer . . . . .	278
duty of, arising from public employment . . . .	279

	Page
<b>CARRIERS</b> . . . . .	275
measure of damages against . . . . .	277, 279, 282, 284, 285, 288
damages against, in Admiralty . . . . .	290
<b>CASE</b> , action on the . . . . .	150
<b>CAUSATION</b> , chain of, interrupted . . . . .	47
<b>CAUSE</b> , not regarded as efficient, when . . . . .	54
<b>CAUSE AND CONSEQUENCE</b> . . . . .	45
<b>CAUSE AND EFFECT</b> ,	
legal view of . . . . .	45
illustration of question as to . . . . .	59
<b>CERTAINTY</b> ,	
rule of . . . . .	15, 26
illustrations of rule of . . . . .	27
rule of, when not applicable . . . . .	95
<b>COMMON COUNTS</b> . . . . .	209
<b>COMMON LAW</b> , originally a law of torts . . . . .	2
<b>COMMON LAW PRINCIPLES</b> . . . . .	15
<b>COMPENSATION</b> ,	
must be commensurate with injury . . . . .	17, 32
legal not complete . . . . .	18
does not extend to all consequences . . . . .	49
<b>COMPOUND INTEREST</b> . . . . .	135
<b>CONSEQUENTIAL</b> , loose use of term . . . . .	195
<b>CONSEQUENTIAL DAMAGES</b> ,	
in tort . . . . .	62
in contract . . . . .	64
<b>CONSIDERATION</b> ,	
failure of . . . . .	212
when measure of damages . . . . .	311, 318
<b>CONSORTIUM</b> , loss of . . . . .	100
<b>CONSPIRACY</b> . . . . .	198
<b>CONSTRUCTIVE TOTAL LOSS</b> . . . . .	267
<b>CONTRACT</b> ,	
what elements of injury considered in . . . . .	34
interference with, a tort . . . . .	206
damages in . . . . .	208
consequential damages in . . . . .	209
<i>assumpsit</i> , general form of action for recovery in . . . . .	208

<b>CONTRACTS,</b>	<b>Page</b>
division into implied and express . . . . .	211
<i>contra bonos mores</i> . . . . .	221
unconscionable . . . . .	221
telegraphic . . . . .	35
<b>CONTRIBUTION,</b>	
between wrong-doers . . . . .	144
in equity . . . . .	145
<b>CONVERSION . . . . .</b>	178
no fixed rule in action for . . . . .	181
<b>COSTS . . . . .</b>	36
<b>COUNSEL FEES . . . . .</b>	36
<b>COVENANTS,</b>	
to repair . . . . .	310
in deeds . . . . .	311
of seizin . . . . .	312
for quiet enjoyment . . . . .	312
of warranty . . . . .	312
reasons for rule as to . . . . .	319
against encumbrances . . . . .	314
to remove existing encumbrance . . . . .	318
to pay all claims against land . . . . .	318
to save harmless . . . . .	318
<b>CRIMINAL CONVERSATION . . . . .</b>	170
<b>DAMAGE,</b>	
early method of ascertaining . . . . .	2
when gist of action . . . . .	53
<b>DAMAGES,</b>	
interest in subject of, modern . . . . .	1
rules as to, of recent growth . . . . .	1
rules of . . . . .	3
effect of modern procedure on . . . . .	3
development of rules of . . . . .	5
germ of rule as to . . . . .	7
growth of law of . . . . .	9
codes of . . . . .	10
study of . . . . .	13
affected by motive . . . . .	16
necessarily pecuniary . . . . .	23

**DAMAGES — *continued.***

	Page
must come from cause of action . . . . .	23
alternative rules of . . . . .	24
hypothetical . . . . .	27
speculative . . . . .	27
most comprehensive rule of . . . . .	32
no recovery for . . . . .	33
two conflicting tendencies as to . . . . .	40
direct, proximate, consequential, or remote . . . . .	46
direct . . . . .	49
proximate . . . . .	49
remote . . . . .	50
consequential . . . . .	50
direct, always recoverable . . . . .	51
direct, involved in statement of cause of action . . . . .	51
when co-terminous with liability . . . . .	53
conjectural . . . . .	64
rules of, subject to variation . . . . .	262, note 1
measure of, when not affected by nature of interest . . . . .	264
general, imported by cause of action . . . . .	304
<b>DAMNUM ABSQUE INJURIA</b> . . . . .	21
<b>DEATH BY WRONGFUL ACT</b> . . . . .	172
<b>DEBT,</b>	
action of . . . . .	216
on bond , . . . . .	216
extinguished by conveyance of land . . . . .	259
<b>DECEIT</b> . . . . .	198
<b>DECEPTION</b> followed by damage . . . . .	22
<b>DESPATCHES, telegraphic</b> . . . . .	294
<b>DETINUE</b> . . . . .	185
<b>DISCOMFORT</b> . . . . .	98
<b>DISCRETION OF JURY, control of court over</b> . . . . .	142
<b>DOMESTIC RELATIONS</b> . . . . .	146, 164
<b>DUTIES</b> . . . . .	19
 <b>EJECTIONE FIRMÆ, writ of</b> . . . . .	 200
<b>EJECTMENT</b> . . . . .	200
at first not fictitious . . . . .	201
supplants real actions . . . . .	201
modern statutory action of . . . . .	202

	Page
EJECTMENT SUIT, costs of . . . . .	203
ELEMENTS OF INJURY, not necessarily pecuniary . . . . .	23
ENTIRE DAMAGES . . . . .	109
EXCLUSION, rules of . . . . .	32, 64
EXEMPLARY DAMAGES . . . . .	85
not allowed in all jurisdictions . . . . .	86
reasons for giving . . . . .	87
responsibility of master for . . . . .	89
in case of gross negligence . . . . .	93
FACT AND LAW, effects of separation of . . . . .	5
FALSE IMPRISONMENT . . . . .	163
FALSEHOOD, no action for, without damage . . . . .	161
FORCE, overpowering . . . . .	54,
FORMS OF ACTION, effect of abolition of . . . . .	9
FRAUD . . . . .	198
FREIGHT, insurance on . . . . .	267
GOODS, carriage of . . . . .	275, 276
HADLEY <i>v.</i> BAXENDALE,	
rule in . . . . .	66
notice under rule in . . . . .	68
INCONVENIENCE . . . . .	97
INDEMNITY,	
contracts of . . . . .	254
between principal and surety . . . . .	259
INFANCY, no defence in tort . . . . .	158
INJURIA SINE DAMNO . . . . .	21, 22
INJURIES, pecuniary and non-pecuniary . . . . .	95
INJURY,	
two general heads of . . . . .	24
must proceed from cause of action . . . . .	32
compensation must be commensurate with . . . . .	32
elements of . . . . .	95
limitations of . . . . .	108
limitations of, in title . . . . .	112
INSANITY, when no defence in slander . . . . .	157

<b>INSURANCE,</b>	<b>Page</b>
against fire . . . . .	261
against fire, case of open policy . . . . .	262
rights of mortgagee and mortgagor . . . . .	264
marine . . . . .	267
on lives . . . . .	269
<b>INSURER,</b>	
right to rebuild or repair . . . . .	262
measure of damages against . . . . .	264
<b>INTEREST . . . . .</b>	<b>127</b>
original rule as to . . . . .	128
governing principle as to . . . . .	129
is the value of the use of money . . . . .	129
discretion of jury as to . . . . .	129
on liquidated demands . . . . .	131
initial point for . . . . .	131
in the courts of New York . . . . .	132
on overdue paper . . . . .	133
not allowable when defendant not in default . . . . .	134
in suits for recovery of land . . . . .	204
<b>JUDGMENT, evidence of damages as against surety . . . . .</b>	<b>259</b>
<b>JURY,</b>	
original nature of . . . . .	2
arbitrary power of . . . . .	2, 3
control of, in tort . . . . .	42
discretion of, in tort . . . . .	42, 44
discretion of, no longer arbitrary . . . . .	44
proximate cause, question for the . . . . .	58
<b>LAW MERCHANT . . . . .</b>	<b>267</b>
<b>LIABILITY,</b>	
connection of, with damages . . . . .	46-50
existence and extent of . . . . .	52
in tort, joint and several . . . . .	144
<b>LIBEL . . . . .</b>	<b>155</b>
<b>LIFE, duration of . . . . .</b>	<b>153</b>
<b>LIQUIDATED DAMAGES . . . . .</b>	<b>221</b>
<b>LITIGATION, expenses of . . . . .</b>	<b>36, 203</b>

	Page
MALICE . . . . .	155
MALICIOUS PROSECUTION . . . . .	162
MARINE INSURANCE,	
open policy . . . . .	262
valued policy . . . . .	269
MARKET, the, usual measure of value . . . . .	120
MARRIAGE, value of . . . . .	302
MEASURE OF DAMAGES, abstract form of . . . . .	17
MENTAL SUFFERING . . . . .	98
in seduction . . . . .	61
varieties of . . . . .	103
in tort and contract . . . . .	104
conjectural . . . . .	105
result of rigid rule as to . . . . .	107
in actions of assault . . . . .	151
MESNE PROFITS, trespass for . . . . .	202
MIND, condition of, unimportant, when . . . . .	53
MISTRIAL, rules as to . . . . .	5
MITIGATION . . . . .	143
MONEY, rule in actions for recovery of . . . . .	35
MOTIVE,	
does not affect liability . . . . .	15
affects damages . . . . .	16
imputation of . . . . .	92
NEGLIGENCE,	
contributory . . . . .	33, 74
degrees of . . . . .	93
exemption from liability for . . . . .	278
NEGOTIABLE INSTRUMENTS . . . . .	238
NEGOTIABLE PAPER,	
payment in . . . . .	258
relations of parties to . . . . .	260
NOMINAL DAMAGES, . . . . .	21, 81
in contract . . . . .	82
in tort . . . . .	82
NOTICE, by surety . . . . .	260
NUISANCE . . . . .	194

	Page
OFFICERS, actions against . . . . .	189
OMISSION, responsibility for . . . . .	53
 PAIN . . . . .	 97
PARTIAL LOSS . . . . .	267
PARTIES, contemplation of . . . . .	64
PASSENGER, suit by, tort or contract . . . . .	291
PASSENGERS, carriage of . . . . .	275, 276
PENALTY, when limit of recovery . . . . .	219
PERFORMANCE, preparations for . . . . .	210
PERILS OF THE SEA . . . . .	267
PERSON AND FAMILY . . . . .	149
PERSONAL INJURY . . . . .	152
PERSONAL PROPERTY, contracts for delivery of . . . . .	241
POLICY OF INSURANCE, open or valued . . . . .	261, 268
POSSESSION OF REAL PROPERTY, action for . . . . .	199
PRICE . . . . .	120
PRINCIPAL, suit by, against agent . . . . .	272
PRINCIPAL AND SURETY . . . . .	258
PRIVACY, right of . . . . .	164
PRIVILEGED COMMUNICATIONS . . . . .	156
PROCEDURE, modern rules of, described . . . . .	4
PROFITS, allowance of . . . . .	27
PROMISE,	
breach of . . . . .	35, 302
value of, involved in contract . . . . .	53
breach of, survival of action for . . . . .	303
PROSPECTIVE DAMAGES . . . . .	109
PROXIMATE CAUSE,	
rule of . . . . .	15, 45
involves two questions . . . . .	45
a question for jury . . . . .	58
in contract . . . . .	62
in insurance . . . . .	63
in marine insurance . . . . .	267
PUBLIC OFFICERS, actions against . . . . .	84
 QUANTUM MERUIT . . . . .	 215

# INDEX.

335

<b>REAL ACTIONS,</b>	<b>Page</b>
in New England . . . . .	202
decay of . . . . .	200
<b>REAL ESTATE,</b>	
contracts affecting . . . . .	309
interference with . . . . .	192
<b>REINSURANCE . . . . .</b>	<b>266</b>
<b>REPLEVIN,</b>	
history of . . . . .	185
modern use of . . . . .	186
<b>RES ADJUDICATA, covers questions of damage . . .</b>	<b>109</b>
<b>RESPONSIBILITY, in tort, extent of . . . . .</b>	<b>54</b>
<b>RIGHT, infringement of, imports damage . . . . .</b>	<b>21</b>
<b>RIGHTS, legal . . . . .</b>	<b>18, 19</b>
 <b>SALES . . . . .</b>	 <b>241</b>
payment in advance . . . . .	245
time of breach . . . . .	249
of real estate . . . . .	319
<b>SEDUCTION . . . . .</b>	<b>168</b>
gist of action for . . . . .	61
mutual fault in . . . . .	305
<b>SERVICE,</b>	
actions for loss of . . . . .	165
contracts of . . . . .	237
<b>SLANDER . . . . .</b>	<b>158</b>
<b>SPECIAL DAMAGE . . . . .</b>	<b>145</b>
<b>SPECIAL DAMAGES . . . . .</b>	<b>145</b>
<b>SPECIFIC PERSONAL PROPERTY, recovery of . . .</b>	<b>185</b>
<b>SPOKEN WORDS, when action lies for . . . . .</b>	<b>160</b>
<b>STATUTORY DAMAGES . . . . .</b>	<b>12</b>
<b>SURETY, consequential damages recoverable by . . .</b>	<b>259</b>
 <b>TELEGRAPH COMPANIES,</b>	
not common carriers . . . . .	294
consequential damages against . . . . .	296
mental suffering in suits against . . . . .	297
<b>TELEGRAPHIC DESPATCHES, two classes of . . .</b>	<b>296</b>

<b>TORT,</b>	
discretion of jury in . . . . .	10, 141
anticipation of consequences in . . . . .	53
notice of no importance in . . . . .	62
damages in . . . . .	139
<b>TORT AND CONTRACT . . . . .</b>	<b>40</b>
basis of classification . . . . .	11
natural line between . . . . .	42
difference between . . . . .	52
fundamental distinction between . . . . .	64, 72
distinguishing mark between . . . . .	140
<b>TOTAL LOSS . . . . .</b>	<b>267</b>
<b>TRESPASS, writ of . . . . .</b>	<b>149</b>
<b>TROVER,</b>	
consequential damages in . . . . .	62
varying rules in . . . . .	142
 <b>UNDERTAKING, statutory . . . . .</b>	 <b>220</b>
<b>USE, value of . . . . .</b>	<b>128</b>
 <b>VALUE . . . . .</b>	 <b>120</b>
intrinsic . . . . .	121
higher intermediate . . . . .	182
at place of destination . . . . .	277
<b>VESSEL, insurance on . . . . .</b>	<b>267</b>
 <b>WAGER POLICIES, illegal . . . . .</b>	 <b>264</b>
<b>WARRANTY . . . . .</b>	<b>250</b>
<b>WILL,</b>	
independent, intervention of . . . . .	34
freedom of, in law . . . . .	47
<b>WRIT, object of . . . . .</b>	<b>149</b>
<b>WRIT OF ENTRY . . . . .</b>	<b>202</b>

# THE STUDENTS' SERIES.

## CAREFULLY PREPARED TREATISES

BY COMPETENT WRITERS ON THE ELEMENTS OF THE LAW.  
COVERING SUBJECTS TAUGHT IN DISTINCT COURSES  
IN THE LEADING LAW SCHOOLS.

**A**MONG the authors who have prepared volumes for this important series are MELVILLE M. BIGELOW, LL.D., the distinguished law writer, and lecturer at Boston University, Northwestern University, and Michigan University; Prof. EUGENE WAMBAUGH, late of Iowa State University, now of the Law Department of Harvard University; Prof. WILLIAM C. ROBINSON, of Yale College, now head of the Law Department of the Catholic University, Washington, and author of "The Law of Patents"; Hon. THOMAS M. COOLEY, the eminent author of "Constitutional Limitations"; EDWIN E. BRYANT, Dean of the Law Department of the State University of Wisconsin; MARSHALL D. EWELL, LL.D., M.D., of the Kent College of Law, Chicago; the late BENJAMIN R. CURTIS, Justice of the United States Supreme Court, and lecturer at Harvard University; Prof. EDWARD AVERY HARRIMAN, of the Northwestern University Law School; Prof. ERNEST W. HUFFCUT, of Cornell University School of Law; Prof. FRANCIS M. BURDICK, of the Law School of Columbia University; ARTHUR G. SEDGWICK, the well-known writer; WILLIAM WIRT HOWE, formerly Chief Justice of Louisiana; the late Judge JOHN WILDER MAY, etc.

### VOLUMES ALREADY ISSUED IN "THE STUDENTS' SERIES."

- I. Bigelow's Elements of the Law of Bills, Notes, and Cheques.
- II. Bigelow's Elements of Equity.
- III. Bigelow's Elements of the Law of Torts.
- IV. Bigelow's Law of Wills for Students.
- V. Bryant's Principles of Code Pleading.
- VI. Burdick's Law of Sales.
- VII. Burdick's Law of Partnership.
- VIII. Cooley's General Principles of Constitutional Law in the United States of America.
- IX. Curtis's Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States.
- X. Ewell's Manual of Medical Jurisprudence for the Use of Students at Law and of Medicine.
- XI. Harriman's Elements of the Law of Contracts.
- XII. Heard's Principles of Civil Pleading.
- XIII. Heard's Principles of Criminal Pleading.
- XIV. Howe's Studies in the Civil Law.
- XV. Huffcut's Elements of the Law of Agency.
- XVI. May on the Law of Crimes.
- XVII. Robinson's Elementary Law.
- XVIII. Robinson's Forensic Oratory: A Manual for Advocates.
- XIX. Sedgwick's Handbook of the Law of Damages.
- XX. Stephen's Digest of the Law of Evidence.
- XXI. Stimson's Glossary of Technical Terms, Phrases, and Maxims, of the Common Law.
- XXII. Wambaugh on the Study of Cases.

The Volumes are of 12mo size, containing from 800 to 400 closely printed pages. Price per Volume: cloth, \$2.50 net; law sheep, \$3.00 net.

See also list of "Cases" on next page.

## THE STUDENTS' SERIES.

### CASES TO ACCOMPANY "THE STUDENTS' SERIES."

Beale's Cases on the Law of Damages.  
Bigelow's Cases on the Law of Bills, Notes, and Cheques.  
Bigelow's Cases on the Law of Torts.  
Burdick's Cases on Partnership (8vo. \$4.50 net).  
Burdick's Cases on Sales (8vo. \$4.50 net).  
Chaplin's Cases on Criminal Law.  
Hufcut's Cases on Agency.  
Wambaugh's Cases for Analysis.

*The Volumes of Cases are bound in cloth only, and unless otherwise stated, the size is small 8vo, and the price \$3.00 net.*

In planning and developing the Students' Series, five objects have been constantly sought:—

FIRST. That each subject should be treated by a man specially fitted through study, training, and experience.

SECOND. That the arrangement should be logical, and the treatment concise, clear, and comprehensive.

THIRD. That the principles of the law of each subject, the real foundation and framework, should be so carefully and clearly presented and explained that the student could grasp the facts and the reasons for them, and feel with these firmly in mind that he would be able to handle successfully the variations which may come later.

FOURTH. That the cases cited and commented on should be those on which the law rests, and which most clearly show how and why the law became what it is. Not quantity of citations, but quality and strength, have been sought.

FIFTH. That the cost of the volumes should be kept as low as possible, consistent with the highest standards, both of authors' text and quality of manufacture.

Teachers and students alike understand the advantage of having books prepared for them by men who are specialists, and who devote themselves to the subjects on which they write. With such requirements books cannot be written to order in three or four months, and several years have been spent in building up the Students' Series to its present size, while a number of works on other important subjects are now in careful preparation.

The volumes of the Students' Series are in use as text-books in leading law schools throughout the United States. Of them, one of the most learned teachers of law in America, the late Prof. William G. Hammond, of St. Louis, said:—

"In planning this series of law books for students you have rendered a very great service, not only to the students themselves, but also to the profession. There has been no greater obstacle to all efforts for a higher standard of legal education than the lack of such books."

And this testimony as to the plan has been repeated as to execution, by numbers of prominent teachers in letters to the authors and publishers, and by the more valuable testimony of introduction and use with their classes.

See subsequent pages for full information regarding each work.

### BIGELOW ON BILLS AND NOTES.

**Elements of the Law of Bills, Notes, and Cheques, for Students.** By MELVILLE M. BIGELOW, Ph.D., author of "Elements of the Law of Torts," etc. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

Mr. Bigelow's reputation as a clear, logical, and strong student and instructor in the law is established by his standard treatises no less than by the masterly "Elements of Torts," so well known to and extensively used by teachers and students of law. This book is a discussion of the *elements of the Law of Bills and Notes*, not an elementary treatise in the sense of touching on the simpler questions only. The groundwork of the law, complex as well as simple, is discussed fully, clearly, and exhaustively. Cases that are really *leading cases* are referred to in sufficient number to illustrate and support the points of law stated.

It is particularly adapted for students' work. — J. C. KNOWLTON, *Law Department, Michigan State University.*

It bears evidence of the conciseness and power of accurate statement which characterize the other work of the author, and I am convinced that it will prove a very satisfactory book for class use. — EMILIN McLAIN, *Chancellor Law Department, Iowa State University.*

It is written with the clearness, force, and logic characteristic of the learned author. In the arrangement — in what it includes, and in what it omits as well — one can easily discern the hand of the practised teacher, as well as of the experienced legal writer. — Prof. E. W. HUFFCUT, *Cornell University School of Law.*

I believe it to be decidedly the best student's book upon the subject that has yet appeared. — Prof. F. R. MECHEM, *Law Department, Michigan State University.*

*To accompany the above : —*

**Cases on the Law of Bills, Notes, and Cheques.** Edited by MELVILLE M. BIGELOW. Crown 8vo. Cloth, \$3.00 net.

### BIGELOW ON EQUITY.

**Elements of Equity for the Use of Students.** By MELVILLE M. BIGELOW, Ph.D., lecturer in the School of Law, Boston University, author of "Elements of the Law of Torts," etc. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

It is to be commended for its clearness and conciseness of statement. I regard the first chapter as a model. The doctrines of Tacking, Subrogation, and Marshalling, found in Chapters 14, 19, and 20, are more easily comprehended than in any other work on those subjects that I have seen. — Hon. J. H. Carpenter, *Dean of Law Faculty, University of Wisconsin.*

### BIGELOW ON TORTS.

**Elements of the Law of Torts for the Use of Students.** By MELVILLE M. BIGELOW, Ph.D., author of "A Treatise on the Law of Estoppel," "A Treatise on the Law of Fraud," etc. Sixth edition, revised and enlarged. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

In the sixth edition of this well-known text-book the author has devoted much time and care to the development of the general doctrine of "Torts" as an introduction to the study of "Specific Torts." This work, done with his usual thoroughness and clearness, does away with the one criticism made on the work, that it plunged the student into the study of specific torts without instructing him in the general law of the subject. The whole book has been carefully revised, and many passages rewritten. The book is now theoretically and practically complete and logical.

It seems to me admirably adapted to the purpose for which it is written. Mr. Bigelow is very happy in his statement of legal principles, and nowhere so much so, I think, as in this book. — HON. THOMAS M. COOLEY.

I have examined Bigelow on Torts, and find it to be an excellent text-book for students. The author is plainly a master of his subject, and not merely a good compiler. . . . The work is, in my judgment, a model "Institute." — R. MCP. SMITH, *Vanderbilt University*.

A clear and compact treatise, well fitted to be a manual of a student of law. — HON. JOHN BASCOM, *University of Wisconsin*.

*To accompany the above: —*

**Cases on the Law of Torts.** Edited by MELVILLE M. BIGELOW.  
Crown 8vo. Cloth, \$3.00 net.

---

### BIGELOW'S LAW OF WILLS.

**The Law of Wills. For Students.** By MELVILLE M. BIGELOW, Ph.D., author of "Elements of the Law of Torts," etc., editor of "Sixth American Edition of Jarman on Wills," etc. 12mo. Cloth, \$2.50 net; sheep, \$3.00 net.

No teacher of law in America is more familiar with the theory of the Law of Wills than Mr. Bigelow, and students everywhere are to be congratulated on the publication of a new work on this subject by an author so experienced and so learned.

---

### BRYANT'S CODE PLEADING.

**The Principles of Code Pleading for the Use of Students.** By EDWIN E. BRYANT, Dean of the Law Department of the State University of Wisconsin, and late Assistant Attorney-General of the United States. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

The science of code pleading being a development of the last fifty years, and getting its shape and form gradually from the decisions of the courts as well as from the enactments of the law-making bodies, has only within a few years been treated in any satisfactory way by text writers.

Many instructors feel, however, that too much time is needed for the student to get the elementary principles from the larger books; and this book is written to bring within easy reach, in condensed and clear form,

the true elements of the subject ; to give the student sufficient knowledge of the old common law pleading for a foundation for the less formal, but not necessarily less exact, pleading under the code, and to put in orderly array the principles of this branch of the law, which have too frequently been considered, by students, at least, as of little importance.

The principles are presented in a clear, satisfactory manner, and the Code References are a valuable addition. In short, it exactly supplies a want as a text-book for students, whether in offices or law schools, wherever the *reformed procedure* prevails or is largest. — CHARLES M. CAMPBELL, *Law Department, Colorado State University.*

---

### BURDICK ON SALES.

**The Law of Sales of Personal Property.** By FRANCIS M. BURDICK, of the Law School of Columbia University. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

In this work by an author and teacher of reputation and experience, questions are discussed with a fulness proportioned to the trouble they give to the student, or to his aptness to misapprehend the principles they involve. The essential terms of the "sale contract" are classified and distinguished from agreements merely collateral to it, to bring order out of the judicial and text-book chaos of "conditions and warranties."

The provisions of the Statute of Frauds bearing upon the sale of goods are treated in connection with the common law topics to which they relate. This method is novel, avoiding much repetition, and giving economy of space and equal economy of time and perplexity to the student.

It is a small magazine of learning. — *New York Nation.*

It is a most admirable treatise. — JAMES B. SOUTT, *Los Angeles Law School, Los Angeles, Cal.*

*To accompany the above : —*

**Selected Cases on the Law of Sales of Personal Property.** By FRANCIS M. BURDICK. 8vo. Cloth, \$4.50 net.

---

### BURDICK ON PARTNERSHIP.

**The Law of Partnership, including Limited Partnerships.** By FRANCIS M. BURDICK, Dwight Professor of Law in Columbia University. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

In this work the principles of Partnership Law are stated with an especial view to the needs of the student, as these have revealed themselves to the writer during his experience in the lecture-room. It is a branch of the law which has never proved particularly simple or easy for students, but the author has tried to point out the chief sources of difficulty and to save the student from needless perplexity.

*To accompany the above : —*

**Selected Cases on the Law of Partnership, including Limited Partnerships.** By FRANCIS M. BURDICK. 8vo. Cloth, \$4.50 net.

## COOLEY ON CONSTITUTIONAL LAW.

**The General Principles of Constitutional Law in the United States of America.** By THOMAS M. COOLEY, author of "A Treatise on Constitutional Limitations," etc. Third edition, by A. C. McLAUGHLIN, of the University of Michigan. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

No volume of the "STUDENTS' SERIES" is better known or has received a wider indorsement than Judge Cooley's admirable exposition of the principles of Constitutional Law in the United States.

In the new edition large additions have been made, and the topics suggested by the increasing number of points of contact and interferences between State and Federal Constitutions are particularly amplified.

Since the last edition appeared, the Supreme Court has passed for the first time on the citizenship of a Chinaman born of alien parents in this country, on the constitutionality of eight-hour laws, etc., while the decisions affecting the control of interstate commerce have been highly important.

I have, since the first publication of the work, been familiar with the book, and I regard it as among the best of the distinguished author's works. Its simple but perfect and logical arrangement, and clear and concise treatment of subjects, with the citations of the leading decisions for the support of the text, make it the best and most complete hand-book, for the use of students on the subject of Constitutional law, of which I have any knowledge. — HON. R. H. ALVEX, *Court of Appeals of the District of Columbia.*

---

## CURTIS ON UNITED STATES COURTS.

**Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States.** By BENJAMIN R. CURTIS, LL.D., late Associate Justice of the Supreme Court of the United States. Edited by GEORGE TICKNOR CURTIS and BENJAMIN R. CURTIS. Second edition, by H. C. MERWIN, Law Department of Boston University. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

These lectures were delivered by the late Judge Curtis to a class of students in the Harvard Law School, in the academic year 1872-73, and were edited and prepared for the press by his son and brother, both lawyers of prominence. Mr. Merwin has devoted much time to the consideration of the recent changes and developments in the practice of the Federal Courts; and his additions, in the second edition, are thought by those who have examined them to deserve the words of commendation bestowed upon Judge Curtis's original text.

A work of the highest standard on the subject treated. — *Boston Post.*

Cannot fail to be of great service to the student in the prosecution of his legal studies. — *Chicago Legal News.*

It is by far the best epitome of that extensive subject; and the clearness of the style and orderly arrangement of the learned author will especially recommend it to students. — HON. EDMUND H. BENNETT, *Dean of School of Law, Boston University.*

### EWELL'S MEDICAL JURISPRUDENCE.

**A Manual of Medical Jurisprudence for the Use of Students at Law and of Medicine.** By MARSHALL D. EWELL, M.D., LL.D., of the Union College of Law, Chicago. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

Mr. Ewell has endeavored to produce a work which, *within a moderate compass*, states all the leading facts and principles of the science concisely and yet clearly. In it will be found *the substance of all the principles stated in the more voluminous and expensive works*.

It is excellently done. I wish it might be read by every student of law as well as by every student of medicine. — Prof. HENRY WADSWORTH ROGERS, *when at University of Michigan*.

I can safely say that for use as a text-book, either in a medical college or law school, it is preferable to any book of my acquaintance. In his chapter on Malpractice, Professor Ewell has succeeded, within the compass of eighteen pages, in setting forth the general doctrine of the law so comprehensively as to make it highly useful for the practitioner as well as the student. — HENRY H. INGERSOLL, *Dean Law Department, University of Tennessee*.

---

### HARRIMAN ON CONTRACTS.

**Elements of the Law of Contracts.** By EDWARD AVERY HARRIMAN. Professor of Law in the Northwestern University Law School. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

The justification of this book is . . . that it is an attempt to explain the rules of positive contract law in accordance with the actual historical development of those rules, and to classify and arrange those rules as far as possible in a scientific manner.

The cases cited and referred to have been selected with the greatest care, as best illustrating and explaining the rules and doctrines of the law of contracts.

A most admirable summary of the subject. — B. J. RAMAGE, *Dean Law Department, University of the South*.

A superior and original work. — WILLIAM TRICKETT, *Dean Dickinson School of Law*.

It is certainly a departure from the usual method of dealing with the subject, and I am inclined to think a departure in the direction of a clearer and better understanding of the law. — C. P. NORTON, *Buffalo Law School*.

---

### HEARD ON CIVIL PLEADING.

**The Principles of Pleading in Civil Actions.** By FRANKLIN FISKE HEARD. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

Under whatever system of statutory procedure a law student may design to practise, he will find it equally necessary to become familiar with the principles of common law pleading. Mr. Heard's work is a plain and clear guide to these. — ELINOR E. BALDWIN, *Law Department of Yale College*.

## HEARD ON CRIMINAL PLEADING.

**The Principles of Criminal Pleading.** By FRANKLIN FISKE HEARD.  
12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

It deserves an important position among the text-books in every law school in the country. — WILLIAM C. ROBINSON, *Dean Law Department, Catholic University of America.*

---

## HOWE ON THE CIVIL LAW.

**Studies in the Civil Law and its Relations to the Law of England and America.** By WILLIAM WIRT HOWE, late Justice of the Supreme Court of Louisiana. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

The book differs in plan from the merely antiquarian and academic treatises on Roman and Civil Law. The author has studied and practised his profession both in the common law States of Missouri and New York and in the civil law State of Louisiana, and has written this book in the light of large experience. The special feature of the work is found in the presentation of the leading principles of the Roman and Civil Law and the tracing of their development and application in our own jurisprudence to the complications of modern life, thus taking up the comparative study of the Civil Law and of the Law as we have it now. The book will be of practical use, not only in our numerous law schools, but to those members of the bar who may wish to investigate the subject.

Has every quality which such a book needs, and which, to say the least, most books on Roman Law in English have not. It is simple, clear, and intelligible, and we can strongly recommend it to the student, or to any one interested in the subject. — *The Nation.*

---

## HUFFCUT ON AGENCY.

**Elements of the Law of Agency as relating to Contract.** By ERNEST W. HUFFCUT, Professor of Law in Cornell University School of Law. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

Law schools and law offices obtain in this book what has long been needed, — a book on Agency written clearly and concisely by a man whose own experience with his classes has taught him what were the fundamental principles of the law, and how best to arrange and present those principles.

The citation of authorities for the purpose of illustrating the rules of law is very full and from varied sources. It is not intended as a special digest of the subject, but all the points of law are amply supported by the best authorities.

I am particularly impressed by the clear and scientific arrangement. — GEORGE E. BEARS, *Law Department, Yale University.*

Perhaps the most striking characteristic of the book is the painstaking and accurate analysis which the subject has received. . . . It is logical in its arrangement,

## THE STUDENTS' SERIES.

---

accurate in its statement of the law, and discriminating in its citations of authorities. — *American Law Register and Review*.

The work is a very good one indeed. — CHARLES M. SLACK, *Dean Hastings College of Law*.

I have examined with some care Professor Huffcut's treatise on Agency, and am much pleased with it as a text-book for the use of students. — Prof. R. S. GOULD, *Law Department, University of Texas*.

To accompany "*Huffcut on Agency*":—

**Cases on the Law of Agency.** By ERNEST W. HUFFCUT. Crown 8vo. Cloth, \$3 00 net.

---

## MAY ON CRIMINAL LAW.

**The Law of Crimes.** By J. WILDER MAY, Chief Justice of the Municipal Court of the City of Boston. Second edition, edited by JOSEPH HENRY BEALE, Jr., Assistant Professor of Law in Harvard University. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

This new edition of Judge May's deservedly popular work contains large additions. The editor states in the preface that the original plan included no discussion of the subjects of Criminal Pleading and Practice; but it was found that it would be better adapted to the use of students if these subjects were briefly considered, and this has accordingly been done. Much has also been added to the first chapter, which contains the general principles underlying the criminal law.

It is to be especially commended for its clear and concise definitions, as also for its citations of leading cases directly upon the matter under discussion. — From J. H. CARPENTER, *Law Faculty, University of Wisconsin*.

It is not a mere synopsis, but an interesting discussion, quite full enough to give the student a true view of the subject, and minute enough to be a useful handbook to the practitioner. — *New York Law Journal*.

To accompany "*May's Criminal Law*":—

**Cases on Criminal Law.** By H. W. CHAPLIN. New edition, enlarged. Crown 8vo. Cloth, \$3.00 net.

---

## ROBINSON'S ELEMENTARY LAW.

**Elementary Law.** By WILLIAM C. ROBINSON, LL.D., Professor of Elementary Law in Yale College. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

Contains a statement of the principles, rules, and definitions of American Common Law, both civil and criminal, arranged in logical order, with references to treatises in which such definitions, rules, and principles are more extensively discussed.

This work is intended to serve three purposes: First, to form a text-book for the use of students in law schools, and of others who are under competent instruction; second, to guide private students in their investigation

of the rules and definitions of law; third, to render students familiar with some of the leading treatises upon the principal topics of the law.

The book is convenient to the instructor who will use it as a text to be amplified in his lectures, and valuable to the student who will consult the references. — Prof. M. F. FOACA, LL.D., *Cincinnati Law School*.

---

### ROBINSON'S FORENSIC ORATORY.

**Forensic Oratory: A Manual for Advocates.** By WILLIAM C. ROBINSON, LL.D., author of "The Law of Patents for Useful Inventions," "Elementary Law," etc. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

A new and suggestive work on the duties and functions of the advocate. The chapters on the Presentation of Ideas by the Production of Evidence in Court, the Qualification and Training of Witnesses, and on Direct, Cross, and Re-Direct Examination, commend the book especially to the bar as well as to students.

The trained lawyer as well as the student will find much that is helpful and suggestive in the pages of this volume, especially on the subject of cross examination. It is the result of a long experience and a constant study of the trial of causes.

This is a book which no student of law can afford to pass by without a thorough study of it. It is also a work which no practising lawyer who undertakes the trial of causes, and is not already an acknowledged leader in the courts, can afford not to read and read again. — *American Law Review*.

It touches upon vital points, just such as students of oratory, especially those who are entering upon the practice of law, need to have urged upon them in this forcible way. — THOMAS C. TRUMBLOOD, *Professor of Elocution and Oratory, Department of Law, Michigan University*.

---

### SEDGWICK'S ELEMENTS OF DAMAGES.

**Elements of Damages: A Handbook for the Use of Students and Practitioners.** By ARTHUR G. SEDGWICK. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

This book is not an abridgment of the work embodied by the author in his edition of the well-known three-volume treatise on the Measure of Damages, by Theodore Sedgwick. *The entire field has been re-examined, and the whole law of Damages reviewed.* Its principles are stated in the form of rules or *propositions of law such as a court might lay down to a jury*, and these propositions are illustrated by the cases from which they have been drawn. Wherever local variations from these rules exist, such local differences are stated, and their causes, so far as possible, explained.

As a students' book it is very admirable. Probably no one but the author can see how it could be made better than it is. — *American Law Review*.

I can cheerfully recommend the book as an excellent presentation of the elements of the subject. — EMLIN MCCLAIN, *Chancellor Law Department, State University of Iowa*.

## THE STUDENTS' SERIES.

---

Throughout the volume the references to, as well as the illustrations of, underlying principles are judicious. It is decidedly a meritorious work. — Prof. CHARLES M. CAMPBELL, *Law Department, University of Colorado.*

*To accompany the foregoing work:—*

**Cases on the Law of Damages.** By JOSEPH H. BEALE, Jr., of the Harvard Law School. Crown 8vo. Cloth, \$3.00 net.

---

### STEPHEN'S DIGEST OF EVIDENCE.

**A Digest of the Law of Evidence.** By Sir JAMES FITZ-JAMES STEPHEN. From the fourth English edition. With Notes and Additional Illustrations to the present time, chiefly from American Cases, including those of JOHN WILDER MAY, late Chief Justice of the Municipal Court of the City of Boston, author of "The Law of Insurance," etc. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

A full reprint of the fourth English edition, revised by the author, with references to American cases.

Short as it is, we believe it will be found to contain practically the whole law of the subject.

---

### STIMSON'S LAW GLOSSARY.

**Glossary of Technical Terms, Phrases, and Maxims of the Common Law.** By FREDERICK JESUP STIMSON. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

This book is a concise Law Dictionary, giving in common English an explanation of the words and phrases, English as well as Saxon, Latin, or French, which are of common technical use in the law. The popular and usual acceptance of each phrase is given in much the same general shape as it stands in the mind of the trained lawyer.

A very convenient little work, especially useful to students of the law. — *Chicago Legal News.*

---

### WAMBAUGH'S STUDY OF CASES.

**The Study of Cases: A Course of Instruction in Reading and Stating Reported Cases, Composing Head-Notes and Briefs, Criticising and Comparing Authorities, and Compiling Digests.** By EUGENE WAMBAUGH, Professor in the Law Department of Harvard University. Second edition. 12mo. Cloth, \$2.50 net; law sheep, \$3.00 net.

The purpose of the work as expressed by its author is "to teach the methods by which lawyers detect *dicta*, and determine the weight of reported cases." The full discussion of this introduces many important and interesting topics, such as the following: How to write a Head-Note, How to criticise Cases, Combining and Preparing Cases, The Growth of Legal Doctrine,

The Importance of the Unwritten Law, The Respect for Authority, The Preparation of Briefs, How to compose a Digest, etc.

A subject of the greatest importance to legal practitioners, and one which, strange to say, has never before engaged the attention of any of our legal writers. We know of no work of greater importance to the student. It should be adopted as a text-book by every law school in the country. — *The Green Bag*.

We commend this book, not merely to students of the law, but to practising lawyers, and even to judges on the bench. It incidentally teaches how to write a decision, as well as how to find out the doctrine of a decision after it is written. — *The American Law Review*.

Will be found to be of great value to the student or young lawyer when studying by himself, and, if carefully studied, cannot fail to give him ideas which he could get elsewhere only by long experience and from hints found scattered through many volumes. — Prof. O. W. ALDRICH, of the Ohio State University.

Altogether unique in the way of legal literature. There are very many lawyers old in the practice who will regret that they were not afforded in their student days such discipline as is suggested by this book; and there is no lawyer who cannot read with profit its first eight chapters. — *The Chicago Law Journal*.

Among the most valuable publications for the use of students which have appeared in recent years. The work abounds in fertile suggestions. — *The American Law Register and Review*.

It is a valuable addition to the Law Students' Series. — E. H. BENNETT, Dean School of Law, Boston University.

By the same author, to accompany "The Study of Cases": —

**Cases for Analysis.** By EUGENE WAMBAUGH, Professor in the Law Department of Harvard University. Crown 8vo. Cloth, \$3.00 net.

---

Among the legal publications of Little, Brown, & Company are many other works particularly adapted for the use of students. Among them may be mentioned: Kent's Commentaries on American Law; Walker's Introduction to American Law; Dwight's Law of Persons and Personal Property; Greenleaf on Evidence; Parsons on Contracts; Washburn on Real Property; Schouler on Personal Property, on Bailments, and on Domestic Relations; Story on Equity Pleading, and on the Constitution; etc., etc. Catalogues on application.

---

**LITTLE, BROWN, AND COMPANY,**  
**PUBLISHERS,**  
**254 Washington Street,**  
**BOSTON.**





178

BB ASI CRe  
Elements of damages.

Stanford Law Library



3 6105 044 076 532

TY LAW LIBRARY

LIBRARY OF THE  
LELAND STANFORD JR. UNIVERSITY